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# FEDERAL COMMUNICATIONS COMMISSION REPORTS
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VOLUME 40 (2d Series)

Pages 893 to 1050

Reported by the Commission

## FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

ROBERT E. LEE
NICHOLAS JOHNSON
H. REX LEE
CHARLOTTE T. REID
RICHARD E. WILEY
BENJAMIN L. HOOKS

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F.C.C. 73-472

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA INC., AGAINST NATIONAL
BROADCASTING CO. TELEVISION NETWORK

ORDER

(Adopted May 3, 1973; Released May 8, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING AND ISSUING A STATEMENT: COMMISSIONERS JOHNSON, REID, AND WILEY CONCURRING IN THE RESULT.

1. The Commission has before it an Application for Review filed on January 29, 1973 by Accuracy in Media Inc. of the ruling of the Broadcast Bureau of January 19, 1973.

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct.* Accordingly, pursuant to Section 1.115 (g) of the Commission's Rules and Regulations, the Application for Review is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

Today, I concurred with my colleagues, with the understanding that the Commission will expeditiously review, and hopefully revise, the fairness doctrine criteria that now must be met by all interested parties. Such revisions should be designed with the objective of easing the "burdens" of all parties involved in a fairness doctrine controversy.

*It may be noted, however, that the Commission is currently considering in Docket No. 19260 the working of the fairness doctrine, including specifically the question of the amount and kind of information concerning a station's programming to be furnished by a complainant.



109-039—73——1

F.C.C. 73-191

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Applications of AMERICAN TELEVISION AND COMMUNICATIONS CORP. For Construction Permits in the Cable Television Relay Service | CPCAR-299 CPCAR-300 CPCAR-301 CPCAR-309 |

MEMORANDUM OPINION AND ORDER

(Adopted February 14, 1973; Released February 22, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. Pending before the Commission are the above-captioned applications for construction permits in the Cable Television Relay Service (Part 78 of the Commission's Rules) filed by American Television and Communications Corporation (ATC), operator of cable television systems at Chanute, Parsons, Neodesha, and Independence, Kansas. ATC proposes a four hop microwave communications facility to carry the signals of KMBC-TV, KBMA-TV, both Kansas City; and WIBW-TV, Topeka, Kansas, to its four above-listed cable television systems. On August 18, 1972, the Commission granted ATC Certificates of Compliance authorizing carriage of these signals, among others, on its four cable television systems.[1]

2. Southeast Kansas Microwave, Inc. (formerly Sekan Microwave, Inc.), a point-to-point microwave common carrier, has filed a petition to deny ATC's applications. Southeast, through its microwave service, provides signals to ATC's cable television systems in Chanute and Parsons. Southeast contends that if ATC's applications are granted, the possibility exists that Southeast will be ineligible to continue its operations pursuant to Sections 21.700 [2] and 21.709(a) [3] of the Commission's Rules because fifty percent of its customers will no longer be

[1] Chanute, Kansas—CAC-207, KS003; Independence, Kansas—CAC-208, KS004; Neodesha, Kansas—CAC-209, KS005; Parsons, Kansas—CAC-210, KS006.

[2] Section 21.700 of the Rules provides in pertinent part:
. . . applications for stations to be used to relay television signals to community antenna television systems must include a showing that at least 50 percent of the customers (on the microwave system involved), including customers of any interconnecting carrier(s), receiving applicant's service are unrelated and unaffiliated with the applicant, and that the proposed usage by such customers, in terms of hours of use and channels delivered, constitutes at least 50 percent of the usage of applicant's microwave system. Applications which do not contain the showing required by this section will be returned as unacceptable for filing.

[3] Section 21.709(a) of the Rules provides:
An application for renewal of a license of a station in the Domestic Public Point-to-Point Microwave Radio Service used to relay television signals to community antenna television systems must include a showing that at least 50 percent of the customers (on the microwave system involved), including customers of any interconnecting carrier(s), receiving applicant's service are unrelated and unaffiliated with the applicant, and that the usage by such customers, in terms of hours of use and channels delivered, constitutes at least 50 percent of the usage of applicant's microwave system. Applications which do not contain the showing required by this section will be returned as unacceptable for filing.

unrelated and unaffiliated. The principals of Southeast, Larry and Cole Hudson, own stock in Vikoa, Inc., which in turn owns Southeast's other cable customers. Southeast claims that the possible discontinuance of its operations would adversely affect its present affiliated customers, perhaps causing them to construct their own CAR system, and that this would be an unnecessary duplication of facilities. It further contends that ATC has failed to show a need for its proposed service and that in any event ATC's service would create an unnecessary duplication of Southeast's existing service.

3. ATC, in response to Southeast's petition to deny, argues that there is a need for the proposed service. Specifically ATC contends that during the period it has been receiving microwave service from Southeast, the general quality of the delivered signals has been so poor that ATC received numerous complaints from its subscribers. In support of its contentions, ATC has submitted a daily log and letters from individuals which purport to show that the general level of the microwave service was inconsistent, sporadic, and often interrupted for long periods of time. Southeast responded to ATC's allegations by claiming that the alleged deficiencies and interruptions in service were not attributable to itself but rather to ATC. It further contends that the log and letters submitted by ATC are of no probative value, and in any event show that the alleged problems emanate from ATC's equipment.

4. During the pendency of this proceeding, the parties have continued to file pleadings and counter pleadings which, stripping aside various quibbles, basically reargue the same points previously made. Essentially the pleadings revolve around two basic points of view: 1. ATC's dissatisfaction with its present microwave service and desire to provide its own service; 2. Southeast's fear that loss of ATC as a customer will possibly create a conflict with the Commission's Rules.

5. The essential issue in this case appears to be whether the possible future effects of Sections 21.700 and 21.709(a) can be used as justification for the Commission to deny the instant application. The net effect of such a ruling would be to force this cable television operator to accept service from this common carrier which in the past it apparently found to be unsatisfactory. We believe that, given the facts of this case, we can not. For the Commission to accept Southeast's position and deny the present application, we believe, would be an unwarranted and unjustified interference in what essentially appears to be a private business judgment without a sufficient showing that the public interest, convenience or necessity would be served thereby. Nor is there anything in the Commission's Rules that would otherwise require ATC to continue to receive common carrier service which it considers to be inadequate in lieu of constructing its own facilities. We note further that Southeast's fears for its related customers are perhaps unfounded. Southeast can divest its interests in its related customers or, alternatively, the waiver procedure is available for cases of extraordinary hardship or public interest factors. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205.

6. Finally, on February 9, 1973, Southeast filed a "Petition for Stay" of Commission action. Southeast alleges that Commission action in this case might cause it "irreparable harm" allegedly because it is engaged in negotiations with ATC for sale of its microwave facilities and Com-

mission action might upset the bargaining position of the parties. We find this petition without merit. The private bargaining position of the parties is not relevant to the merits of the case. To stay action for this reason, we believe would not serve the public interest, convenience, or necessity.

In view of the foregoing, the Commission finds that a grant of the subject applications would be consistent with the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the "Petition to Deny" filed December 3, 1971, by Southeast Kansas Microwave, Inc., IS DENIED.

IT IS FURTHER ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, and Section 78, *et seq.*, of the Commission's Rules that the above-captioned applications ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-242

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re<br>ARMSTRONG UTILITIES, INC., BOARDMAN TOWNSHIP, OHIO<br>For Certificate of Compliance | CAC-413<br>OH188 |

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 7, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE CONCURRING AND ISSUING A STATEMENT.

1. On May 16, 1972, Armstrong Utilities, Inc., filed an application (CAC-413) for certificate of compliance for a new cable television system at Boardman Township, Ohio, a community located in the Youngstown, Ohio, television market (#79). Armstrong proposes to offer approximately 36,110 persons the following Ohio television broadcast signals: WFMJ-TV (NBC), WKBN-TV (CBS), and WYTV (ABC), all Youngstown; and WVIZ-TV (Educ.), WKBF-TV (Ind.), and WUAB (Ind.), all Cleveland. In its application, Armstrong requests a waiver of section 76.31 of the Commission Rules. Armstrong's application is opposed by WKBN Broadcasting Corporation, licensee of Station WKBN-TV, Youngstown, Ohio.

2. In its application, Armstrong alleges that Boardman Township does not have authority to grant a franchise. In support of its contention Armstrong submitted two documents: (a) a letter from the Clerk-Treasurer of Boardman Township which in effect states the Township Trustees' belief that they do not have jurisdiction; and (b) copies of a public statement by the Auditor of Ohio, Joseph T. Ferguson, which states in pertinent part:

> While municipalities are empowered to regulate and franchise public utilities, no such authority exists permitting townships to regulate public utilities. Again, it must be pointed out, townships are creatures of statute and possess only those power expressly granted by statute or necessarily implied therefrom. Therefore, townships may not franchise cable television systems. . . .

Armstrong contends that it is fully qualified to construct and operate a cable television system in Boardman Township, and states that it will fully comply with all Commission rules and regulations present and future. Armstrong has supplied its proposed rates for service to subscribers; a plan for the resolution of service complaints; and states it will maintain a local business office. In view of the foregoing, Armstrong asserts that it qualifies under Par. 116, *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 366, which provides for case by case consideration where it is claimed that there

is no franchise or other appropriate authorization available for the cable operator to submit in his application for a certificate of compliance.

3. WKBN Broadcasting contends that Armstrong has failed sufficiently to establish that the Township Trustees lack franchising authority, and that even if the Trustees cannot grant a franchise Armstrong should be required to show that it cannot alternatively obtain a franchise from Mahoning County, or even the State of Ohio. Finally, WKBN Broadcasting argues that minimally Township Trustees should pass upon Armstrong's qualifications to operate in the Township.

4. On December 13, 1972, Armstrong amended its application to reflect a resolution adopted by the Board of Trustees of Boardman Township on December 4, 1972. Essentially, the resolution supports the installation and operation by Armstrong of a cable television system and specifically states that Armstrong's qualifications and construction arrangements "are fully acceptable to the Board of Trustees". The resolution further provides: 1. that Armstrong will provide service to at least 40% of the Township within one year of obtaining certification from the Commission; 2. that Armstrong will maintain a local business office, and complaints will be resolved expeditiously; 3. that Armstrong will operate and maintain its system in full compliance with all local and federal laws and regulations, "in particular the regulations of the Federal Communications Commission as they now exist or as they may thereafter be adopted"; and 4. a schedule of initial subscriber rates and a proviso that the rates may not be increased without the approval of the Board of Trustees.

5. We believe that a grant of Armstrong's requested waiver would be appropriate. The Trustees' resolution substantially moots WKBN's objections. Further, we believe it to be an "appropriate authorization" within the meaning of Section 76.31(a) of the Rules,[1] and can see no need to require Armstrong to seek further authorization from either Mahoning County or the State of Ohio. This grant is made for a limited duration, to March 31, 1977, and is subject to compliance with any further conditions imposed by the Commission during the period until March 31, 1977. We believe that we should not prevent cable development in localities where a supervising governmental entity is not now present, or the extent of its authority is in question. In any event, in 1977 we shall have the opportunity to review the matter and may require special showings if there has been no local regulatory change. Compare *Sun Valley Cable Communications*, FCC 73-27, — FCC 2d —.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.31 of the Rules and grant of the above-captioned application would be consistent with the public interest.

According, IT IS ORDERED, That the "Objection to Application for Certificate of Compliance" filed July 3, 1972, by WKBN Broadcasting Corporation IS DENIED.

[1] Section 76.31(a) provides in pertinent part:
"In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements: . . . ."

IT IS FURTHER ORDERED, Section 76.31 of the Rules IS WAIVED to the extent indicated above, and that the "Application for Certificate of Compliance" (CAC–413) filed May 16, 1972, by Armstrong Utilities, Inc., IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

The certificate of compliance applications, filed by Armstrong Utilities, Inc. and Mahoning Valley Cablevision, Inc. for proposed cable television systems in various Ohio townships, raise the same issue as to the Commission's approach in those instances where there is no franchise or other appropriate authorization (see Rule 76.31) available for submission by a cable operator in a certificate of compliance application. In paragraph 116 of our *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972), we indicated that the Commission would deal with such a situation on an *ad hoc* basis and that a cable operator would be required to include an acceptable alternative proposal in his certificate application, which would insure that the substance of our rules (and specifically, the franchise standards of Rule 76.31) is complied with. In paragraph 117 of the *Reconsideration Order*, we also stressed that proposed cable operations would not be delayed indefinitely until local jurisdictional disputes are settled.

Here, in the instant cases, both cable operators contend that Ohio townships have no authority to issue cable television franchises, and they support this claim with statements of local Ohio officials. They, therefore, request that their alternative proposals be accepted by the Commission pursuant to paragraph 116 of the *Reconsideration Order*. The Commission concludes that grant of the certificate applications is warranted under the circumstances so that cable development is not hindered in localities where a supervising governmental entity is not now present or the extent of its authority is in question.

While I have no quarrel with the adequacy of the cable operators' proposals in terms of our franchise standards and have concurred in grant of the certificate applications, I am concerned about the apparent absence of governmental franchising authority in Ohio communities other than municipalities. Our regulatory approach in the *Cable Television Report and Order*, 36 FCC 2d 143 (1972), was deliberately based on a "structured dualism" whereby both federal and local authorities share responsibility for the effective implementation of cable television service. Local franchising was made an integral part of our program so that specific standards concerning such matters as rate charges and service complaints could be implemented by local authorities. In those states where no local authority exercises jurisdiction over cable television operations, however, we must rely entirely on cable operators to achieve compliance with our prescribed standards.

I would hope that, before March 31, 1977, the State of Ohio and other similar jurisdictions will seriously consider the need to clarify

the status of cable regulation so that the Commission's regulatory approach can be fulfilled. While I agree that cable development should not be unnecessarily delayed in localities where no governmental authority exercises jurisdiction or where there is a jurisdictional dispute, I intend to remain alert to any problems that could adversely affect the subscribing public.

F.C.C. 73-502

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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|---|---|
| In the Matter of<br>AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES DEPARTMENT<br>Revisions of Tariff F.C.C. No. 260 Private Line Services, Series 5000 (TELPAK) | Docket No. 18128 |
| AMERICAN TELEPHONE & TELEGRAPH CO.<br>Revision of American Telephone & Telegraph Co., Tariff F.C.C. No. 260 Series 6000 and 7000 Channels (Program Transmission Services) | Docket No. 18684 |

MEMORANDUM OPINION AND ORDER

(Adopted May 9, 1973; Released May 15, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONER JOHNSON CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER REID CONCURRING IN THE RESULT.

1. We have under consideration Application No. 903 filed by the American Telephone and Telegraph Company (AT&T) on October 16, 1972, applicable to television program transmission private line services and the written material submitted by AT&T in support of its application. *Attachment 1.* hereof sets forth the specific changes proposed by AT&T. We also have under consideration the written comments and pleadings of interested parties in opposition to and in support of such application.

2. We have given careful consideration to the contentions and views of all parties in this matter and it is our opinion that a grant of the application in its entirety as proposed by AT&T would result in undue delay and disruption in the resolution of the issues in Docket 18684 of the consolidated proceeding herein. The filing of all of the tariff revisions as requested by AT&T would raise questions of lawfulness that are essentially the same as the issues herein in Docket 18684. AT&T's basic justification for the proposed rate changes is grounded upon facts and conclusions which it has recently asked us to make herein in its March 12, 1973 "Proposed Findings of Fact and Conclusions of Bell System Respondents" (Pages 292–354). However, these proposed findings of fact and conclusions of AT&T are vigorously disputed as being contrary to the evidence of record by other parties. (See, e.g. Proposed Findings and Conclusions of Hughes Sports Network, Inc.) Under these circumstances we conclude that we should not permit the filing of the rates and rate structure as proposed by AT&T.

3. Although we are unable to grant AT&T's application in the form submitted by it, we are of the view that we should not defer action

on the merits of such proposal for the indefinite period required to reach final resolution of the complex rate level issues involved in the consolidated proceeding herein in Docket 18128. We believe that there may be justification for some internal rate structure adjustments in AT&T's TV program transmission services pending such rate level decisions. We believe that the principal issues raised by AT&T's application relate to whether and to what extent there is, or should be, separate, dedicated facilities for occasional and monthly contract users and what the relationships should be between the charges for the two sub-classes of service. As to these issues, we believe that such internal rate structure questions in Docket 18684 can and should be treated on a priority basis and decided by the Commission in the relatively near future.

4. Accordingly, we shall modify the procedures herein insofar as these issues are concerned and, in lieu of a recommended decision by the Chief, Common Carrier Bureau, we shall schedule oral argument *en banc* on these questions and render our decision thereon. In our later decision in Docket 18128, we will determine the appropriate overall revenue requirements and rate levels necessary to meet such requirements for the principal classes of service, including the TV Program Transmission service.

5. For purposes of the modified procedures herein we shall, of course, consider all probative, reliable and substantial evidence of record herein relevant to the rate structure issues and the Proposed Findings and Conclusions thereon and Replies thereto. In addition, we shall also take official notice of AT&T's application No. 903 and all of the written data and information submitted by AT&T in support thereof, together with all of the written comments thereon heretofore submitted by all persons opposing or supporting AT&T's application. It is our intention and expectation to issue our final decision on these issues within four months from the release date of this Memorandum Opinion and Order.

6. We believe that, pending our decision after oral argument we should exercise our discretion and permit AT&T to file and make effective (upon appropriate notice to its customers) the proposed monthly contract rates set forth in *Attachment 1*. These charges will effectuate an estimated reduction in charges of about $18 million a year to the users and will reduce AT&T's monthly contract rates to a level that AT&T claims is cost justified while at the same time enabling AT&T to compete with other carriers offering similar service at rates generally lower than the contract rates proposed by AT&T. We stress that, in allowing these contract rates to be filed and to become effective pending our decision, we are not approving or disapproving such rates and they will be subject to accounting requirement and possible refunds to the extent that they may cause any increases in charges to customers vis-a-vis either the presently effective rates or the pre-October, 1969 rates.[1] With respect, however, to the proposed revisions in occasional rates, we conclude that we should not allow the proposed revisions to be filed in these rates pending our decision on the rate structure issues in Docket 18684. Unlike the monthly contract rates, the occasional rate proposals involve increases that are substantial, both in the

[1] See Memorandum Opinion and Order in Docket 18684, FCC 69-1038, released October 6, 1969.

aggregate and as to individual customers; if filed, questions would be raised as to the lawfulness thereof, particularly with respect to our decision in *Hughes Sports Network, Inc.;*[2] and, in view of the magnitude of the increases as to individual customers, it is questionable whether an accounting order with provision for possible refunds, would be an adequate safeguard of the rights of occasional users if we should later find the occasional rates to be unlawfully high. However, in view of the inequities that may arise from any undue delay in the resolution of this matter, we are of the opinion that, if we have not issued our decision on the rate structure issues within 120 days from the release date of this Memorandum Opinion and Order, we should allow AT&T to file revised tariffs publishing the occasional rates set forth in *Attachment 1.*, on the usual 60 days' notice required by our rules.

7. We find that due and timely execution of our functions imperatively and unavoidably requires the modified procedures we are adopting herein.

8. Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201–208 and 403 of the Act. That ORAL ARGUMENT SHALL BE HELD before the Commission *en banc* at Washington, D.C. commencing at 9:00 a.m. on June 26, 1973 on the questions of whether and to what extent the program transmission facilities offered under AT&T's Tariffs are or should be dedicated to "contract" and "occasional" users; whether and to what extent such facilities are or should be used interchangeably by "contract" and "occasional" uses; and, in the light of the findings of facts on these issues, whether there should be any revisions in the relationships between the "occasional" and "contract" rates and, if so, what revisions should be required or permitted by the Commission.

9. IT IS FURTHER ORDERED, That each person desiring to participate in such argument shall file with the Commission on or before June 5, 1973, its brief on the issues and a separate written summary of the oral argument and the amount of time requested for argument.

10. IT IS FURTHER ORDERED, That official notice will be taken of AT&T's Application 903 and the written material submitted by it in support thereof and of all of the written comments and pleadings of all persons heretofore submitting written comments in opposition to or in support of such application.

11. IT IS FURTHER ORDERED, That AT&T is hereby granted permission to file forthwith the monthly contract charges set forth in *Attachment 1.* effective on 30 days' notice to the Commission and the public (including actual notice to all customers where increases are involved) and such monthly contract charges shall be subject (a) to accounting and possible refunds insofar as they effectuate increases to any customer over either the present or the pre-October, 1969 charges and (b) to such modifications and revisions as we may permit or require in our decision on the issues herein.

12. IT IS FURTHER ORDERED, That, if we have not released our decision following oral argument within 120 days from the release date of this Memorandum Opinion and Order, AT&T, upon the expira-

[2] 25 FCC 2d 550 (1970); 34 FCC 2d 691 (1972).

tion of such 120-day period, may file, on 60 days' notice, tariffs publishing the occasional rates set forth in *Attachment 1.* hereof.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

TELEVISION SERVICE—RATE COMPARISON

| Monthly | Present rates | Proposed rates |
|---|---|---|
| Interexchange channel—per mile: | | |
| 24 hours | | $55.00 |
| 1st hour | $12.10 | |
| Cons. hrs.—per hour | 4.40 | |
| Non-cons. hrs.—per hour | 6.60 | |
| Station connection—per connection: | | |
| 24 hours | | 1,500.00 |
| 1st hour | 580.00 | |
| Cons. hrs.—per hour | 147.00 | |
| Non-cons. hrs.—per hour | 236.00 | |
| Local and studio-to-transmitter channels—per channel: | | |
| Month | | 1,000.00 |
| 1st month | 1,225.00 | |
| Cons. months—per month | 725.00 | |

| Occasional | Present rates | Proposed rates |
|---|---|---|
| Interexchange channel—per mile: | | |
| Per hour | | $1.00 |
| 7AM-1AM | $.55 | |
| 1AM-7AM | .28 | |
| Station connection—per connection: | | |
| Per hour | | 80.00 |
| 7AM-1AM | 26.25 | |
| 1AM-7AM | 13.15 | |
| Local channel—per channel: | | |
| Per day | | 500.00 |
| 1st day | 410.00 | |
| Cons. day—per day | 110.00 | |
| 30 day max | 1,225.00 | 1,000.00 |
| Monitoring: | | |
| 30 minutes or less | 8.00 | 8.00 |
| Exceeding 30 minutes—per hour | 15.00 | 15.00 |
| Switches: | | |
| Per switch | 9.00 | 9.00 |
| One half switch | 4.50 | 4.50 |

## MOTHER [BELL]'S DAY

### OPINION OF COMMISSIONER NICHOLAS JOHNSON, CONCURRING IN PART AND DISSENTING IN PART

This Commission majority seems to have an incredible knack for giving Ma Bell her presents at all the appropriate moments. Its initial decision to stop regulating the reasonableness of the Bell system's own determination of its cost of doing business came just in time for Christmas in 1971. See "Why Ma Bell Still Believes in Santa Claus." *Saturday Review*, March 11, 1972, p. 57. Its decision to increase AT&T's allowable rate of return to a whopping 9.0% graced her Thanksgiving table just last November—and knocked $1.3 billion of stuffing per year right out of the pocketbook of the consumer. Now, just a few short hours before Mother's Day, the Commission does it again, and in the process partially emasculates one of its most important decisions regarding anticompetitive behavior in the telecommunications industries.

In the *Hughes Sports Network, Inc.* decision, 25 F.C.C. 2d 560 (1968); 34 F.C.C. 2d 691 (1972), this Commission held that the rate structure then in existence for users of intercity private lines was heavily discriminatory against the small (or "occasional") user. AT&T's rates were found to be "both unjust and unreasonable under § 201(b) of the ACT and unduly discriminatory under § 202(a) of the Act." In particular, the monthly contract rates, which required users to pay for at least eight hours per day each month before they could get a break from the high "occasional user" rate, and the "occasional user" rate itself, were singled out as totally unreasonable. Bell then came up with the rate structure currently in use, which reduced the occasional service rate from $1.15 per mile per hour to $.55 per mile per hour (or $.28 between 1:00 and 7:00 AM) and set up a sliding scale for the monthly contract user, which allowed the user to purchase anything from one hour per day to twenty four hours per day at a base rate of $12.10 per mile per hour per month for the first hour and just $4.40 per mile per hour for each consecutive hour (or $6.60 per mile per hour for each subsequent non-consecutive hour). Thus, the contract user was allowed considerably greater flexibility, and the occassional service, while still somewhat higher, was at least in reasonable proportion to the contract rates. We decided the new rates looked as though they might at least partially ameliorate the problem, and we allowed them to go into effect while we proceeded to develop a record on which we could make some final determination. See F.C.C. 69–1038, Docket No. 18684, October 9, 1969.

Last Fall, pursuant to our decision requiring AT&T to receive special permission before filing any new tariff in this service, Memorandum Opinion and Order in Docket Nos. 18128/18684, 33 F.C.C. 2d 552 (1972), Ma Bell requested permission to revise the 1969 rates, on which the final decision is still pending. Claiming that increased price competition from specialized microwave carriers was soon going to be siphoning off her largest contract users—primarily the networks—she insisted that she should be allowed to "revise" her monthly contract rate to a more competitive single, 24 hour per day rate of $55.00 mile per month, and at the same time increase the occasional service rate to $1.00 per mile per hour (ostensibly to "make the occasional service more self-supporting").

The latter request was simply a flagrant violation of the letter and spirit of the *Hughes* case, since it would have driven occasional rates virtually all the way back up to their unreasonable pre-1969 rate (of $1.15 per mile per hour). I concur in the majority's refusal to agree to this aspect of the AT&T request.

The "revision" of the monthly contract rate, on the other hand, which my colleagues continually but fallaciously referred to in their oral discussion as a "reduction," has been allowed for filing, and to that action I must vigorously dissent.

It *is* true that the $55.00 rate represents a "reduction" (from a potential 24 hour per day high of $113.30 per mile) for the major network users—a reduction with which I have no problems. (When was the last time Ma Bell asked permission to reduce the price of *anything*?) What *does* disturb me, however, is the fact that these rates will once again require the monthly contract user to take a mini-

mum number of hours per day in order to get the benefits of contract service—in flagrant disregard of an important part of the holding in *Hughes*. Indeed, the major difference between these new rates and the pre-1969 rate structure outlawed in *Hughes* is that under the previous structure the monthly user was required to pay for at least 8 hours per day (at $39.50 per mile) whether he needed them or not, whereas now he must contract for no less than *24 hours per day* (at a rate of $55.00 per mile) whether he needs them or not. This seems to me a curious interpretation of the public interest standard indeed, and one that would have the effect (especially if coupled with the proposed increase in occasional service charges) of forcing the small user—the local network or specialized network or the local station regularly covering distant events—to seriously curtail his service to the public.

Since I am not in conflict with the basic intentions of the majority in attempting to allow AT&T to remain competitive in the intercity private lines service, I would have preferred to allow the "reduction" of the monthly contact rate to $55.00 to become a "reduction" in reality and not just in rhetoric, perhaps by one of two alternative expediencies:

(1) Allow AT&T to file the $55.00 per mile 24 hour per day tariff, but require a *proportional reduction* in rates for monthly users wishing to use fewer hours. Since the present rate of $133.30 represents $12.10 for the first hour plus $4.40 per hour for each of the next 23, Bell might be allowed to retain the "base rate" of $12.10 but required to reduce the additional hourly rate proportionately to $1.87 per mile;

(2) Although the first alternative is logical and in keeping with the spirit of the *Hughes* decision, a considerably less drastic but still sensible solution would simply require that Bell retain the *current* contract rate structure of $12.10 for the first and $4.40 (or $6.60) for each additional hour *up to a cutoff point of $55.00 per mile*, beyond which the same rate applies for up to 24 hours of use.

Since the majority considered neither alternative in allowing Bell to file its $55.00 rate "revision" (which, to counteract the majority's reference to "reduction," I should more appropriately term an "increase") it has run afoul of our own significant decision in *Hughes*—as well as of the recommendations of our common carrier bureau staff, who had initially suggested we deny permission to AT&T to file *either* new tariff, on the theory that to do otherwise would be "a classic example of the kind of tariff application that, if granted, would result in undue delay and disruption in the resolution of the issues in a pending rate case and would impair the integrity thereof." The bureau's language refers to the fact that allowing this new filing would allow Bell virtually to regulate itself, since it would initiate a new rate determination proceeding every bit as complex as the one we have not yet decided regarding the rates currently in effect. The result is a disastrous precedent for allowing AT&T to keep FCC procedures in perpetual motion by merely filing a new rate structure (which automatically takes effect within 60 days and can only be effectively stayed for another 90 days) every time the Commission

looks as though it is getting ready to approve or disapprove the previous one. These two concerns—about undermining the integrity of Commission procedures and partially emasculating the holding of a landmark decision—cannot be ignored in light of the majority's decision regarding the $55.00 rate, and therefore to that aspect I must register a vigorous dissent.

F.C.C. 73-446

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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|---|---|
| In the Matter of<br>AMERICAN TELEPHONE & TELEGRAPH CO.—<br>LONG LINES DEPARTMENT (A.T. & T.)<br>Revisions of Wide Area Telephone (WATS) Tariff FCC No. 259 and Private Line Service (PLS) Tariff FCC No. 260<br>and<br>THE WESTERN UNION TELEGRAPH CO. (WESTERN UNION)<br>Revisions of Tariff FCC No. 254 | Docket No. 19419 |

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released May 4, 1973)

BY THE COMMISSION: CHAIRMAN BURCH DISSENTING FOR THE REASONS SET FORTH IN HIS STATEMENT ATTACHED TO THE MEMORANDUM OPINION AND ORDER, FCC 73-212, 39 FCC 2D 977, IN DOCKET NO. 19696; COMMISSIONERS REID AND WILEY ABSENT.

1. AT&T has filed with the Commission a petition requesting modifications in the procedures established for this proceeding by our Memorandum Opinion and Order (Order)[1], released January 12, 1973. Aeronautical Radio, Inc. (ARINC) has submitted a statement in support of the AT&T petition. The portion of our Order contested by petitioners provides that the Administrative Law Judge shall certify the record herein without preparation of an initial decision, and instructs the Chief of the Common Carrier Bureau (Bureau) to issue a recommended decision. Petitioners urge that we rescind the foregoing procedures and: (a) direct the Administrative Law Judge to file an initial decision; (b) impose the same procedural requirements upon the Bureau's participation in the proceeding as apply to any other party, and preclude the Bureau from participating in the making of the Commission's decisions in the case.

2. The requested modifications are premised upon three arguments. First, that this proceeding is an adjudication under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, and is therefore subject to the restrictions of §§ 409(a) and (c)(1) of the Communications Act (Act).[2] Second, confining the Bureau to an investigative role in the

[1] FCC 73-43.

[2] Section 409 applies to cases of adjudication, as the term is defined in the APA. The pertinent provisions of §§ 409(a) and (c)(1) provide that the officer presiding at the hearing shall prepare an initial decision and that individuals may not participate in the hearing in both adjudicative and decision making capacities.

proceeding would accord Respondents a full hearing compatible with due process. Third, pursuant to § 1.267 of the Commission's Rules, an initial decision must be issued by the Administrative Law Judge or the Commission must make a finding providing reasons for omitting that decision.

3. We decline to modify our Order. Consistent judicial [3] and Commission [4] precedent sustain our conclusion that this proceeding is a rule making, and support the lawfulness of the procedures we have adopted herein. Sound practical considerations also compel our decision to retain the established procedures. It is our present plan to follow a policy of separating the trial staff in selected proceedings, when sufficient staff is available, and such separation is appropriate to the nature of the case. We are implementing this plan on an ad hoc basis, at present, and expect that in the future the trial staff will be separated in most rate making cases. However, before us now is an existing docketed proceeding,[5] instituted over a year ago, in which a prehearing conference has been held and information requests exchanged. The Bureau's limited resources have been allocated to this and to other proceedings in accordance with our desire that a recommended decision should be issued herein. At this late juncture, to reverse these commitments, and to alter the non-adversary posture of the Bureau in this and other proceedings when the staff is not separated would be disruptive to our processes and wholly impractical. At present, sufficient staff is simply not available to conduct all rate proceedings on a separated basis. We believe that in accomplishing a practical transition from non-separated to separated trial staffs, the procedures laid down in existing proceedings should not be disturbed.[6]

4. Accordingly, IT IS ORDERED, That, the petitions of AT&T and ARINC are DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] *American Telephone and Telegraph Company* v. *F.C.C.*, 449 F. 2d 439, 455, (2nd Cir. 1971); *Wilson & Co.* v. *U.S.*, 335 F. 2d 788, 797 (7th Cir. 1964); *cert. den.*, 380 U.S. 951 (1965).

[4] 14 F.C.C. 2d 568 (1968); 2 F.C.C. 2d 877 (1966); 2 F.C.C. 2d 142 (1965).

[5] 33 F.C.C. 2d 518 (1972).

[6] Petitioners' request, if granted in full, would have the effect of denying the Commission freedom to consult with any member of the Bureau concerning this case, irrespective of whether the individual participated in the hearing. This request goes far beyond the procedures which we have prescribed in cases where the trial staff is separated. (For a description of what staff separation entails *see, In re AT&T,* Docket No. 18128, 32 F.C.C. 2d 89, at 90, para. 5 (1971).)



109-039—73——2

F.C.C. 73-447

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>AMERICAN TELEPHONE & TELEGRAPH CO.—LONG LINES DEPARTMENT (A.T. & T.)<br>Revisions of Wide Area Telephone Service (WATS) Tariff FCC No. 259 and Private Line Service (PLS) Tariff FCC No. 260<br>and<br>THE WESTERN UNION TELEGRAPH CO. (WESTERN UNION)<br>Revisions of Tariff FCC No. 254 | Docket No. 19419 |

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1973; Released May 4, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS REID AND WILEY ABSENT.

1. On March 14, 1973, The Western Union Telegraph Company (Western Union) filed under its Transmittal No. 6862 revisions to its Tariff F.C.C. No. 254 to provide (1) a reduction in the monthly charge for its Type 2481 data subset from $145.00 to $125.00 and in the installation charge from $250.00 to $150.00; and (2) the offering of a new type 4600/48 data subset at the same rates as those proposed for the Type 2481 unit. The tariff revisions are effective April 13, 1973. A Petition to Suspend the Western Union tariff was filed March 28, 1973 by The Independent Data Communications Manufacturing Association (IDCMA).

2. Western Union proposes its tariff revisions as a competitive response to revisions filed by The American Telephone and Telegraph Company (AT&T) on November 24, 1972, in its Tariff F.C.C. No. 260 which provided for a data-phone set, type 208, which operates at a rate of 4800 bits per second. AT&T's revised tariff schedules providing for the 208 data-phone set were designated for investigation and hearing by our Memorandum Opinion and Order, released January 12, 1973, FCC 73-43, suspended until March 24, 1973 and consolidated with the proceeding in Docket No. 19419.

3. By Memorandum Opinion and Order released February 7, 1972, 33 F.C.C. 2d 518, we suspended and instituted an investigation into the lawfulness of certain tariff revisions filed by AT&T in its interstate WATS and PLS tariffs. These tariff revisions included: (1) a reduction in rates for AT&T's 201 Type data-phone sets; (2) the offering of an AT&T automatic data access arrangement; (3) provided for more flexible use of AT&T's multi-channel data station equipment;

and (4) established new rates for an additional category of data-phone sets suitable for combined sending and receiving and for handling data at high speeds. These revisions were suspended for the full statutory period. Subsequently AT&T requested and received special permission to file substitute tariffs. We invited comments as to these tariff revisions and by Memorandum Opinion and Order released June 26, 1972, deferred the proceeding in Docket No. 19419 until such comments could be considered.[1] Western Union filed its own tariff schedules effective August 10, 1972 matching the AT&T rates for certain of the data sets offered by AT&T. We determined that the matching rates of Western Union raised substantially the same questions of lawfulness as the AT&T rates and by our Memorandum Opinion and Order of January 12, 1973, also set the Western Union rates for hearing in Docket No. 19419.

4. IDCMA basically contends (1) that the Western Union rate matches precisely the anti-competitive rate which AT&T filed for the 208 data set and which the Commission has already ordered suspended and investigated in Docket No. 19419; (2) that the supporting materials which Western Union has furnished indicate significant disparities between components of its rate and the components of AT&T's 208 rate and (3) that several of the components of the Western Union rates are in and of themselves unjust and discriminatory. Therefore IDCMA requests that the proposed Western Union rate be suspended and investigated in Docket No. 19419.

5. Western Union alleges that as a result of AT&T reducing the rates for its 208 data sets, Western Union faces the choice of whether to remain competitive in offering these medium-speed modems by matching the new rates or to decline to compete by maintaining current rate levels. While the immediate impact of Western Union's proposed rate reduction would be a loss of $17,280 in annualized revenue for its 72 units now in service, Western Union maintains that it should compete since its annual revenue of $1,500 per unit exceeds its estimated avoidable cost of maintenance of $120 per year per unit in this instance by $1,380 per year per unit. This is premised upon an analysis of the fully allocated costs of new types of additional 4800 baud data subsets. In short, it is Western Union's position that unless it is permitted to reduce its rates for the Type 2481 data subset, AT&T would virtually eliminate Western Union's ability to compete in the 4800 baud private line market.

6. We agree with IDCMA that the rates filed by Western Union to match AT&T's 208 rates, which became effective March 24, 1973, and are presently under investigation in Docket No. 19419, raise substantially the same question of lawfulness as do the AT&T rates. Thus we shall consolidate the proposed Western Union rates for hearing in Docket No. 19419. However, we do not deem suspension of Western Union's proposed rate warranted in this instance. We are not unmindful of Western Union's contention that if the reduction is not permitted it may be severely impaired in its ability to compete in the 4800 baud private line market. Moreover, we also note that Western Union

[1] 36 FCC 2d 498.

was denied special permission to file these rates on less than 30 days notice.

7. Accordingly, IT IS ORDERED, That pursuant to the provisions of Sections 201, 202, 203, 204, 205 and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of the tariff schedules filed by The Western Union Telegraph Company submitted with Transmittal No. 6862 including any cancellation, amendments or re-issues thereof; and no changes shall be made in such tariff schedules during the pendency of this proceeding without prior approval by the Commission;

8. IT IS FURTHER ORDERED, That IDCMA's Petition to Suspend IS GRANTED to the extent noted herein and otherwise, DENIED:

9. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the issues set forth in our Memorandum Opinion and Order released February 7, 1972, 33 F.C.C. 2d at 520 in consolidation with the proceeding in Docket No. 19419;

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-452

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In the Matter of | |
|---|---|
| AMERICAN TELEPHONE & TELEGRAPH CO. | P-C-8276-2 |
| ITT WORLD COMMUNICATIONS, INC. | T-C-2452-2 |
| RCA GLOBAL COMMUNICATIONS, INC. | T-C-2448-2 |
| WESTERN UNION INTERNATIONAL, INC. | T-C-2444-2 |
| Applications for Authority To Participate in the Construction and Operation of the TAT-6 SG Submarine Cable System Between the United States and France | |
| AMERICAN TELEPHONE & TELEGRAPH CO. | P-C-8277-2 |
| Applications for Authority To Acquire and Operate Circuits in the CANTAT-II Submarine Cable System Between Canada and the United Kingdom, and To Make Available Circuits in the TAT-6 SG Submarine Cable System Between the United States and France | |
| ITT WORLD COMMUNICATIONS, INC. | T-C-2451-2 |
| RCA GLOBAL COMMUNICATIONS, INC. | T-C-2453-2 |
| WESTERN UNION INTERNATIONAL, INC. | T-C-2443-2 |
| Applications for Authority To Acquire and Operate Circuits in the CANTAT-II Submarine Cable System Between Canada and the United Kingdom | |

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted April 27, 1973; Released May 1, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT.

GENERAL

1. The Commission has under consideration a joint application filed on April 23, 1973 by the American Telephone and Telegraph Company (AT&T), ITT World Communications, Inc. (ITT Worldcom), RCA Global Communications, Inc. (RCA Globcom) and Western Union International, Inc. (WUI) requesting further modification of the Commission's Memorandum Opinion, Order and Authorization adopted herein on July 7, 1972, *American Telephone & Telegraph Co. et al.*, 35 F.C.C. 2d 801 (Decision), which authorized the United States overseas carriers to participate in the construction and operation of the TAT-6 cable system and to acquire on an indefeasible right-of-user (IRU) basis one-half interests in, and to operate, circuits in the CAN TAT-II cable system. The Decision was subsequently modified in part

by the Commission's Memorandum Opinion, Order and Authorization adopted herein February 14, 1973, FCC 73–192. The instant application requests further modification of the TAT–6 Decision.

BACKGROUND

2. In its Decision, the Commission, *inter alia*, authorized:

> a. AT&T to
>
> (1) make available on an IRU basis, the whole interest in up to 150 TAT–6 circuits to the Canadian Overseas Telecommunications Corporation (COTC) and the British Post Office (BPO), and COTC and the French PTT, until the end of 1979, on condition that it have the option to repurchase such circuits at or prior to that time and, further, that any exercise of that option be conditioned on the proportionate reacquisition by COTC of CANTAT–II circuits held by U.S. carriers, and
>
> (2) acquire on an IRU basis half interest in 150 CANTAT–II circuits for a period up to and including the year 1979 to provide its authorized communications service between the United States on the one hand and the United Kingdom and France on the other, provided that it simultaneously dispose of IRU interests in the same number of TAT–6 circuits to COTC, the BPO and the French PTT for the same period of time; and
>
> b. ITT Worldcom, RCA Globcom and WUI to each acquire on an IRU basis half interests in 20 CANTAT–II circuits (for a total of 60 such circuits) up to and including the year 1979, to provide their authorized communications services between the United States and Europe.

3. The above provisions were modified by the Commission's February 14, 1973 Memorandum Opinion, Order and Authorization as follows:

> a. AT&T is authorized to make available to COTC, on an IRU basis, AT&T's interest in 150 of the 312 TAT–6 circuits assigned jointly under the cable construction contract to AT&T and the BPO;
>
> b. AT&T is authorized to acquire on an IRU basis half interests in up to 150 CANTAT–II circuits and operate them until the Commission's decision on an application for a transatlantic submarine facility subsequent to TAT–6 is issued or the end of 1980, whichever first occurs, subject to the conditions that (1) AT&T and COTC shall have agreed that COTC will acquire from AT&T and IRU interest in the same number of TAT–6 circuits by the date the TAT–6 cable becomes operational, and (2) AT&T shall at no time thereafter retain or operate a greater number of the CANTAT–II circuits than the number of TAT–6 circuits retained or operated by COTC unless and until the Commission grants authority to do otherwise upon an appropriately supported application; and
>
> c. RCA Globcom, ITT Worldcom and WUI are each authorized to acquire on an IRU basis half interests in 20 CANTAT–II circuits (for a total of 60 such circuits) for service until the Commission's decision on an application for a transatlantic submarine facility subsequent to TAT–6 is issued or the end of 1980, whichever first occurs, to provide their authorized communications services between the United States and Europe.

4. In the instant joint application, the carriers set forth that, as written, the Commission's July 7, 1972 TAT–6 Decision, as modified on February 14, 1973, is not consistent with the final arrangements which have been agreed on by the parties to the TAT–6 cable project after a long period of protracted and complicated negotiations. It is stated that, on balance, the arrangements set forth in the TAT–6 draft agreement scheduled for signature on May 2, 1973 are reasonable and fairly reconcile the various considerations involved in the complicated negotiations. The joint applicants indicate that our Decision,

as modified, differs from the final arrangements incorporated in the draft TAT–6 construction agreement in three principal respects:

> a. Under the modified Decision AT&T may not, without further authorization by the Commission, terminate the grant to COTC of the IRU of the 150 circuits in the TAT–6 cable system when an additional transatlantic submarine facility after TAT–6 becomes operational and reacquire those circuits from COTC;
>
> b. the modified Decision authorizes the United States carriers to retain half interests in their authorized CANTAT–II circuits until the Commission's decision on an application for an additional transatlantic submarine facility rather than until such a facility becomes operational; and
>
> c. the modified Decision provides for the termination of the acquisition of the subject CANTAT–II circuits at the end of 1980 if the Commission has not acted on an application for an additional transatlantic submarine facility by that time.

Applicants request that the TAT–6 Decision be further modified to permit them to acquire and make available the subject CANTAT–II and TAT–6 circuits under the terms and conditions specified in the draft TAT–6 construction contract.

DISCUSSION

5. In the previous joint application for modification of the Decision which was the subject of our February 14, 1973 Memorandum Opinion, Order and Authorization, AT&T requested that it be permitted to retain its authorized CANTAT–II circuits until the availability of a transatlantic submarine facility subsequent to TAT–6. The three record carriers requested that they be permitted to hold their authorized CANTAT–II circuits without time limitation. As indicated in Paragraph 3 above, we modified our Decision to provide that AT&T and the three record carriers could retain their authorized CANTAT–II circuits until we acted on an application for a transatlantic submarine facility subsequent to TAT–6 or 1980, whichever first occurs. The instant joint application leads us to believe that our intent in specifying this limitation on United States carriers' use of their authorized CANTAT–II circuits in the manner we did has been misconstrued. We did not intend that United States carriers' use of their authorized CANTAT–II circuits end either on the date of an action on an application for an additional transatlantic submarine facility or in 1980. Our use of these dates was intended only to indicate that we believed either of these two instances, whichever first occurred, would be an appropriate time to make a determination on further use by United States carriers of their authorized CANTAT–II circuits. We specifically indicated this in Paragraph 21 of our February 14 Memorandum Opinion, Order and Authorization. We would expect that in preparing any application for another transatlantic submarine facility, the joint applicants would, as they have in like situations in the past, review their future requirements and existing facilities, and that such review would encompass their use of, and need for, their authorized CANTAT–II circuits. As a consequence, it would be appropriate for the joint applicants to include in any such application for an additional transatlantic facility such request for continued use of their authorized CANTAT–II circuits as they may believe is war-

ranted by their review of needed facilities and requirements. Such an approach will enable us to evaluate any proposal for further use of their authorized CANTAT–II circuits they may propose in light of then current circuit use, circuit needs and existing facilities, and a definite proposal for an additional transatlantic submarine facility. Our use of the 1980 date was intended only to fix an appropriate time frame within which, even if an application for an additional transatlantic facility is not filed or granted, applicants may apply for such extension of time to make such additional use of their authorized CAN TAT–II circuits as they may feel they can justify as being in the public interest. In either event, we will then be in a position to modify the dates now fixed as the showings by the carriers and our evaluation of relevant factors indicate will best serve the public interest.

6. Joint applicants further request that the authority granted to AT&T to make available half interests in up to 150 TAT–6 circuits to COTC be limited in the same manner is AT&T's authority to acquire and operate CANTAT–II circuits. The parties indicate that, despite the various forms of the proposals, during the negotiations the parties have always intended that arrangements under which AT&T would acquire and use its authorized CANTAT–II circuits parallel the arrangements under which COTC would acquire and use TAT–6 circuits. We note that our original July 7, 1972 Decision specified this parallel treatment. However, in the previous joint application for modification which was the subject of our February 14, 1973 Memorandum Opinion, Order and Authorization, the joint applicants specifically requested that AT&T be authorized to make interests in the 150 TAT–6 circuits available to COTC for the term of the TAT–6 agreement. While there were indications in documents filed with the Commission that this might not reflect the then current agreements being negotiated, applicants failed to file an amendment to their application changing this request. Consequently, we acted on and granted the request as it was before us. However, we believe now, as we did at the time we originally acted in the matter, that parallel treatment of the 150 TAT–6 circuits and 150 CANTAT–II circuits is proper. We shall, therefore, further modify our Decision to so provide.

7. Lastly, the joint applicants indicate that use of the word "thereafter" in Subparagraph 25(B) of our February 14, 1973 Memorandum Opinion, Order and Authorization which effected modification of Subparagraph (a) of the second ordering clause of the July 7, 1972 Decision has caused some questions as to the meaning of that paragraph. We shall accept the join applicants' suggestion and amend Subparagraph (a) of the July 7, 1972 Decision by the insertion of the words "after the TAT–6 cable becomes operational" in place of "thereafter" in order to clarify our original intent, namely, that the obligation that the number of CANTAT–II circuits retained or used by AT&T shall not exceed the number of TAT–6 circuits retained or used by COTC shall become effective when TAT–6 comes into service.

8. In view of the foregoing, we shall amend the appropriate ordering clauses of our modified Decision to grant the requests made by the joint applicants to the extent discussed above.

9. Accordingly, IT IS ORDERED, that the subject joint applica-

tion of the American Telephone and Telegraph Company, ITT World Communications Inc., RCA Global Communications, Inc. and Western Union International Inc. IS GRANTED IN PART and;

(A) Subparagraph (f) of the first ordering clause of the Commission's Memorandum Opinion, Order and Authorization adopted July 7, 1972, *American Telephone & Telegraph Co. et al.*, 35 F.C.C. 2d 801, is amended to read as follows:

> "AT&T is authorized to make available to COTC, on an IRU basis, AT&T's interest in 150 of the 312 joint AT&T and BPO TAT–6 circuits until the Commission's decision on an application for a transatlantic submarine facility subsequent to TAT–6 is issued or the end of 1980, which ever first occurs."

(B) Subparagraph (a) of the second ordering clause of the July 7, 1972 Decision is amended to read as follows:

> "(a) AT&T is authorized to acquire on an IRU basis a half interest in up to 150 CANTAT–II circuits and operate them until the Commission's decision on an application for a transatlantic submarine facility subsequent to TAT–6 is issued or the end of 1980, which ever first occurs, subject to the conditions that (1) AT&T and COTC have agreed that COTC will acquire from AT&T an IRU interest in the same number of TAT–6 circuits by the date the TAT–6 cable becomes operational, and (2) AT&T shall at no time after the TAT–6 cable becomes operational, retain or operate a greater number of the CANTAT–II circuits than the number of TAT–6 circuits retained or operated by COTC unless and until the Commission grants authority to do otherwise upon an appropriately supported application;".

(C) All other terms and conditions of the July 7, 1972 Decision, as modified, remain the same; and

(D) except to the extent granted above, the joint application of AT&T, ITT Worldcom, RCA Globcom and WUI, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73D-11

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Application of<br>BAY BROADCASTING CORP., BAY ST. LOUIS, MISS.<br>For Construction Permit | Docket No. 18413<br>File No. BP-17244 |

APPEARANCES

*Julian P. Freret* and *Jerome S. Boros*, on behalf of Bay Broadcasting Corporation; *Frank U. Fletcher* and *Marvin Rosenberg*, on behalf of Faulkner Radio, Inc.; *Marvin Rosenberg*, on behalf of witness Michael D. Haas; *Martin Blumenthal* and *Gerald M. Zuckerman*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE MILLARD F. FRENCH

(Issued March 9, 1973; Released Effective May 3, 1973 Pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By order released January 7, 1969, the mutually-exclusive applications of Faulkner Radio, Inc. (hereinafter Faulkner) and Bay Broadcasting Corporation (hereinafter Bay Broadcasting or Bay), were designated for a consolidated hearing. However, on March 19, 1969, the Faulkner application was dismissed with prejudice. Bay Broadcasting's application for a construction permit to build an AM station in Bay St. Louis, Mississippi, for operation on 1190 kc with a power of 5 kilowatts, non-directional, daytime only, was submitted on May 5, 1966. The designation order set forth fifteen issues, including a Section 307(b) issue. With Faulkner out of the picture, issues 7, 8, 9, 10, 11 and 12 were mooted, as were issues 13, 14 and 15, which related to Section 307(b) and comparative considerations. Likewise, issue 1, calling for areas, populations, and availability of other primary service, was nullified.

2. The following issues remained for hearing:

> (2) To determine whether Bay Broadcasting Corporation, or any of its principals, failed to disclose prior bankruptcy proceedings involving Joel Bluestone and Mary Nancy Bluestone.
>
> (3) To determine in connection with the community survey allegedly conducted by Bay Broadcasting Corporation, whether the applicant or any of its principals misrepresented facts to the Commission or have in any manner attempted to deceive or mislead the Commission.
>
> (4) To determine the effect of the facts adduced pursuant to issues 2 and 3, above, on the requisite and comparative qualifications of Bay Broadcasting Corporation to receive a grant of its application.

(5) To determine with regard to the application of Bay Broadcasting Corporation:

(a) Whether the $30,000 loan commitment from the Hancock Bank of Bay St. Louis is available to the application, and, if so, the terms of its repayment and collateral required, if any;

(b) The source of additional funds necessary to meet the costs of construction and operation of the station during the first year; and

(c) In light of the evidence adduced pursuant to (a) and (b) above, whether the applicant is financially qualified.

(6) To determine the efforts made by the applicants to ascertain the community needs and interests of their respective service areas and the manner in which the applicants propose to meet such needs and interests.

3. The first prehearing conference convened on February 7, 1969. Subsequent conferences were held on March 3, March 10 and June 3, 1969. The hearing began on July 15, 1969, with an additional session on July 16, 1969. Thereafter, conferences were held on August 5, 1969, March 16, and May 12, 1970 and April 19, 1971. Hearing sessions were held on August 12, August 13, September 14 and October 5, 1971. The record was closed November 29, 1971, but was reopened on January 27, 1972 because of the serious illness of Joel Bluestone, the 80% owner of Bay Broadcasting, and his subsequent death. A further series of conferences were held on March 21, April 26, July 19, September 21 and October 16, 1972. The final hearing session took place on January 4, 1973, when the record was closed.

4. William C. Garrett, a broadcaster, aspired to succeed to Mr. Bluestone's interests in the applicant and entered into negotiations with attorneys for Bluestone's succession. An amendment to the Bay application, proposing substitution of Garrett for Bluestone was filed October 12, 1972, with a petition for its acceptance, which was granted by the Administrative Law Judge by order released December 8, 1972. Also included in this amendment were revised exhibits containing financial information adequate to demonstrate Bay's ability to construct and operate the proposed station for one year. An additional hearing session was held January 4, 1973, and information relating to Mr. Garrett and the financial issue (issue 5) was received into evidence without objection. As noted hereinbefore, the hearing record was finally closed on that date.

## FINDINGS OF FACT

*Issue 2—The Bankruptcy Issue*

5. This issue was specified because Bay had failed to report that Joel Bluestone and his wife had been involved in bankruptcy proceedings, although Section II of Form 301 requires such information to be reported. Both Mr. and Mrs. Bluestone were principals of Bay at the time the application was filed. As noted above, Joel Bluestone is now deceased and has been replaced by William C. Garrett. Moreover, Mrs. Bluestone is no longer a principal of Bay.

6. In view of the fact that the Bluestones are no longer associated with the Bay application, this issue need not be considered. It is noted, however, that the voluntary bankruptcy was filed by the Bluestones in 1950, and the record shows that Bluestone did not tell Donald Moore, Bay's President and 20% owner, about the bankruptcies until Faulkner Radio raised the question in its petition to deny. The bank-

ruptcy arose because Mr. Bluestone had joined in a business venture with his sister and brother-in-law. The venture, which did not involve broadcasting, was not successful. On advice of counsel, the Bluestones filed a petition in bankruptcy. There is no evidence that Bay or the Bluestones attempted to mislead the Commission by failing to report the bankruptcies. While such inaccuracies in the completion of the Commission application forms, however inadvertent, are not to be condoned, under the circumstances here, and particularly in the light of Bluestone's admission in Bay's reply to Faulkner's petition to dismiss, and at the hearing, the finding is made that failure to report his prior bankruptcy is not of disqualifying magnitude.

*Issue 3—The Misrepresentation Re: Survey Issue*

7. Bay Broadcasting's application listed twenty-three community leaders as having been contacted as part of its ascertainment efforts. These community leaders included Mike Haas, Robert F. Ladner, Reverend John Gasper, Brother Roland, Reverend E. A. Lindsey, Reverend Emory Green, Reverend William Jans, Reverend Lamar Martin, Reverend J. Wilbur Hall, Francis J. Hursey, Charles Shumake, M. A. Stephens, Mrs. John C. Hans and Mr. Lessie Ladner.

8. Approximately sixteen months after Bay had conducted its survey of community leaders, Faulkner filed a petition to deny on May 8, 1967. Faulkner charged that Bay had not in fact interviewed the aforelisted fourteen of the twenty-three community leaders specified in the original application, and submitted affidavits from them, purportedly supporting Faulkner's contention.

9. The above affidavits, mimeographed and identical except for minuscule changes on some of them, recited the following:

**This is to state that I have not been contacted by any representative or representatives of the Bay Broadcasting Company, Inc., concerning any radio station or radio programming. Further, I never had any contact whatsoever with said Company or its representative for any purpose.**

10. Several of the affidavits had handwritten additions to the typewritten paragraph which is quoted above. The handwritten additions supplemented the paragraph with "or any other company," or words to that effect. The affidavits were subscribed in January, February and March of 1967.

11. Donald R. Moore, President and 20% owner of Bay, testified that he contacted the fourteen community leaders in question by telephone in January 1966. He did not mention the name of the applicant when he made the calls because Bay Broadcasting had not yet been chartered as a corporation. The corporate charter was issued on February 25, 1966. In conducting the survey, Moore used a survey sheet which listed eight questions. Moore introduced himself as "Don Moore," stated that he was with a company planning to start a new radio station in Bay St. Louis, and then asked the eight questions. Moore filled out the survey forms for each of the respondents. One of the survey sheets was submitted to the Commission as part of a pleading filed by Bay prior to designation. The balance of the forms had been misplaced, and were not submitted to the Commission prior to designation, but were subsequently discovered and appear in the record as a part thereof.

12. Michael Haas, who prepared the affidavits set forth in paragraph 9, *supra*, is an attorney who practices law in Bay St. Louis. In December 1966, Mr. Haas was approached by Robert M. Thornburn, a Vice President of Faulkner Radio, who told him that the Bay application indicated that Haas had been contacted as part of Bay's ascertainment survey. Haas told Thornburn that he had not been contacted about a radio station for Bay St. Louis, and a short time later Thornburn retained Haas to contact the other community leaders who had allegedly been contacted by Bay.

13. Thereafter Haas and his brother, assisted by their father and Mary Boggs, secured the affidavits which were submitted with the petition to deny filed by Faulkner. Haas developed the affidavit form in order to speed up the process. He would inform the individuals he contacted that he was investigating whether or not they had been contacted by Bay Broadcasting Corporation or its representatives Joel Bluestone and Don Moore. Individuals who said they had been contacted were not asked to sign the affidavit, even if the individuals did not know who had contacted them; however, none of the community leaders who signed the affidavits actually did so in the presence of Mr. Haas.

14. In a battle of affidavits, Bay Broadcasting obtained counter-affidavits from four of the aforesaid fourteen individuals in June 1971. In an attempt to resolve the conflict as to the contacts, counsel for Bay and the Broadcast Bureau agreed to submit written interrogatories to twelve of the fourteen original affiants who could be located. The address of one of the individuals could not be ascertained, and Mr. Haas testified at the hearing. Only five of the individuals responded to the interrogatories, and their responses appear in the record. Their responses did little to resolve the conflict. One respondent could not answer any of the interrogatories and indicated that he did not recall anything about the matter. One respondent answered "No" to the question asking whether he had been called on the telephone in January 1966 regarding a radio station for Bay St. Louis. The remaining three respondents recalled receiving such a telephone call, although one was not sure of the date. None of the three respondents who remembered receiving the telephone call could remember the name of the caller.

15. The resolution of the conflict between Messrs. Moore and Haas is further clouded by the fact that Haas, since 1960, had determined to file an application for a radio station in Bay St. Louis, and had contacted a consulting engineer in August 1961. In 1968, Mr. Haas filed his own application to construct a standard radio broadcast station in Bay St. Louis. The Haas application and two mutually-exclusive applications were designated for hearing on March 23, 1972. Bay Broadcasting filed a petition to deny the Haas application but the Commission ruled that Bay Broadcasting was not a party in interest entitled to participate in that proceeding and the petition to deny the Haas application was denied. Mr. Haas conceded on the record in the present proceeding that denial of the Bay application would help him secure a grant for Bay St. Louis, since, if the Bay Broadcasting application was granted prior to resolution of the comparative hearing involving his application, he would lose a comparative advantage, as

he would no longer be proposing a first local station. Thus, Mr. Haas cannot be considered a disinterested witness. Further, Mr. Haas was not subpoenaed as a witness, but did appear as such in the current case.

*Issue 5—The Financial Qualification Issue*

16. The financial issue designated against Bay does not question the applicant's cost estimates. Rather, the issue inquires into whether Bay has the necessary funds available to meet its estimated first year cost of operation and its estimated cost of construction. Subsequent to the designation of the financial issue, Bay amended its application to increase its original cost estimates. Consequently, the financial issue must be resolved so as to determine whether Bay can meet these increased costs.

17. Bay estimates that it will cost $59,922.47 to construct the proposed facility. It will cost an additional $48,000 to operate the station for one year. To establish its financial qualifications, Bay must show that it has $107,922.47 available to meet its total cost of construction and first year cost of operation.

18. Bay has obtained a bank loan commitment, dated November 20, 1972, from the First National Bank of Slidell, Louisiana. The amount of the loan will be $125,000 and it will be for a term of five years. The interest rate will be 7.5%. However, payments of interest and principal will commence after one year. The bank has conditioned the loan on the endorsement of the note by W. C. Garrett, Bay's 80% stockholder. Garrett has agreed to endorse the note, and, further, has agreed to loan the Corporation up to $10,000 should the same be necessary for the construction and operation of the proposed station.

*Issue 6—Ascertainment of Community Needs*

19. Bay Broadcasting presented demographic data relating to the city of Bay St. Louis and surrounding area, its location and population, labor force, economic pattern, communications, government, services available by federal, state and local institutions, police protection, fire protection, schools, churches, health and medical facilities, sewage facilities, public welfare facilities, and recreational facilities. Civic, social and fraternal organizations and other groups were also listed. Such data, based on the 1970 Census, showed Hancock County to have a population of 17,378, and that the area was non-urbanized, composed of small but growing towns and villages, and recovering from a destructive hurricane. Outlying areas include the towns of Kiln, Pass Christian, Pearlington and Waveland.

20. Bay conducted interviews in June 1969 and June 1971, in addition to those conducted prior to filing its application. During the latter period, applicant's Secretary-Treasurer, Joel Bluestone, personally conducted a series of interviews, making contact with civic, governmental, professional, fraternal, religious, and other leaders in Bay St. Louis and the surrounding communities. Thirty-one community leaders were queried as to area needs. In addition, under Bluestone's direction, and with his participation, a random sampling of the general public was taken. This random survey included representatives of various ethnic and minority groups in the area, as well as members of both sexes and selectees from the various age groups, employment classifications and economic levels.

21. Needs of the Bay St. Louis area were tabulated by applicant and as a result of the survey of community leaders it was concluded that problems include: Inadequate finances; crime; inflation; lack of communication; unemployment; traffic congestion; pornography; inadequate housing; taxes; discrimination against the old, minorities or women; better education; new roads; drugs; improvement of government services; juvenile delinquency; student unrest; recreational facilities; pollution; youth activities; lack of industry; sewage and water treatment; rehabilitation of the community after Hurricane Camille; and racial tension/strife.

22. Members of the general public contacted by the applicant in its random survey found the following community needs of significance: Lack of industry; unemployment; discrimination; drugs; no communication between black and white; not enough activities which involve blacks and whites besides school; public is uninformed; no recreational facilities for teenagers; unemployment; city fathers will not let industry into the community; high taxes; a first radio station; better citizen participation in the local community; more blacktop roads instead of dirt roads; not enough variety of stores; poor drainage and sanitation services; insufficient encouragement for people to stay in the area and build a better economy; wage scales too low; not enough entertainment and restaurants; need for better schools; and inadequate medical facilities.

23. In an effort to schedule programs that will respond to public needs as discerned in its survey, applicant has proposed specific program material to be broadcast at specific times on designated days. These include the following:

*Religious Programs:* To serve the area's spiritual needs, applicant has scheduled religious programming every day of the week. A daily five-minute devotional program will be conducted by various local ministers. Then, on Sundays, applicant will present a one-hour program from 10:00 to 11:00 a.m. which will emphasize the universality of religious truths and the importance of intergroup understanding and fairness.

*Public Affairs:* Previous surveys revealed the rapid expansion and economic growth of the area. This was due in large part to the Mississippi Test Operations, a project of the NASA program. This expansion brought new residents and new problems with a corresponding need to acquaint newcomers with local government and civic problems. However, applicant has ascertained that the Mississippi Test Operations is being phased out. On the other hand, the area suffered great damage as the result of Hurricane Camille and is still in the process of massive rehabilitation. Redevelopment, growth, relocations, as well as new residents require information and instructional programming. For this reason, approximately 2 percent of weekly program time will be allocated to public affairs programming on a regular basis. Three types of programs are projected, namely:

a. *Rehabilitation:* Sunday, 11:00 a.m. to 12:00 noon. This weekly program will feature information on what is being done and what can be done to restore the area. Community leaders and interested parties will be invited to present their ideas, views and recommendations.

b. *Panel Discussions:* Fridays, 5:00 to 6:00 p.m. Once each week, community leaders will present a panel discussion on specific topics of local, regional or national interest and importance. Among the topics which are likely to be features are: unemployment, the rising crime rate, and dealing with drug abuse.

c. *Town Talk:* Thursdays, 5:00 to 6:00 p.m. A weekly program, featuring guests of civic, business or governmental prominence, who will discuss problems of local importance. Members of the public will be invited to call the station with questions, comments or information about the subjects under

discussion. Listeners will not only be informed as to local problems, but, hopefully, spurred into contributing to their solution.

*Talk Programs:* The function of talk programs is to instruct, stimulate and enlighten the audience. Applicant has uncovered a strong local need for information and, therefore, proposes approximately 3 percent of program time for this type of broadcast. Proposed talk programs are:

a. *Teen Talk:* Sundays, 12:00 noon to 12:30 p.m. Area teenagers primarily will participate in this program, which will feature discussions of educational problems, employment opportunities and other subjects of interest to youth. School, social and sports activities of interest to area youth also will be publicized on this program.

b. *Real Estate Report:* Saturdays, 8:00 to 8:15 a.m. The area has been experiencing rapid expansion. It has been noted that rental property is in short supply. For this reason, property availabilities, taxes, gardening and all facets of home rental and ownership will be featured to meet the housing needs of the area.

c. *Bulletin Board:* Daily, 5-minutes per broadcast. A daily bulletin board program is clearly warranted in light of the absence of daily newspapers. Consequently, the station every day will broadcast reports about social, civic, charitable and religious events in the service area.

d. *Sports:* Sports and recreation are of great interest in the area. Hancock County and Bay St. Louis are prominent resort and recreation areas. Common pastimes, such as hunting, fishing and water sports are popular. Also, softball is popular with Bay St. Louis residents. Hence, a daily sports program of five minutes duration will be aired on a continuing basis to inform listeners as to the local sports activities, results and events.

ULTIMATE FINDINGS AND CONCLUSIONS

1. Bay Broadcasting Corporation has filed an application seeking a permit to construct a new standard broadcast radio station in Bay St. Louis, Mississippi. The dismissal of the mutually-exclusive Faulkner Radio, Inc., application eliminated the need to resolve several of the issues originally designated by the Commission. Moreover, the death of Joel Bluestone, Bay's principal stockholder, obviates the necessity of resolving the bankruptcy issue (issue 2). The issues remaining in this proceeding are considered hereinafter.

*Issue 3—Misrepresentation*

2. This issue arose when Faulkner Radio submitted fourteen affidavits from community leaders listed in Bay's application as having been contacted as part of its community needs survey. The affidavits were solicited by Michael Haas at the behest of Faulkner's Vice President, Robert M. Thornburn. The affidavits, which were executed during the first three months of 1967, uniformly indicated that the affiants had not been contacted by "any representative or representatives of the Bay Broadcasting Company, Inc.," regarding a radio station or radio programming. The affiants signed a form affidavit which had been prepared by Haas. Six of the affiants added a notation to their affidavits to indicate that they had not been contacted by Bay or any other company.

3. Donald R. Moore, Bay's President, testified that he contacted each of the fourteen community leaders by telephone. He pointed out that the survey was conducted in January 1966, which was prior to Bay's having received its corporate charter. Consequently, he did not identify Bay by name, but merely introduced himself and told the respondents that he was with a company which was planning to start a new radio station in Bay St. Louis. Moore then asked each respondent

eight questions which appeared on a survey form, and filled in the answers he received.

4. Only one of the fourteen community leaders testified at the hearing—Michael Haas. Haas' testimony was consistent with his affidavit, i.e., he had not been contacted by anyone regarding a radio station in late 1965 or early 1966. Moore disagrees. He contacted Haas because he was President of the Junior Chamber of Commerce.

5. Five of the fourteen affiants responded to interrogatories. However, their responses do not aid in the resolution of the controversy. One respondent did not recall anything regarding Moore's alleged interview; one denied that he was contacted by telephone in January 1966 regarding a radio station for Bay St. Louis; and the remaining three respondents indicated that they received such a telephone call, although one was not certain of the date.

6. This is a difficult issue to resolve. Moore's interest in denying the allegations is apparent. Haas has filed his own application to construct a radio station in Bay St. Louis, and, therefore, also has an interest in the outcome of this proceeding.

7. The Commission has had occasion to note that individuals contacted as part of a community needs survey often do not remember the interview. Sometimes this is due to the passage of time. In other instances, it is due to the cursory nature of the interview which fails to make a lasting impression on the interviewee. See *James J. B. Scanlon*, FCC 70–1218, released November 18, 1970.

8. Here a year passed between the alleged interview and the signing of the affidavits which were submitted with the petition to deny. The interviews were cursory to the extent that they were conducted by telephone and included only eight questions. Moreover, the affidavits disclaim any contacts by Bay Broadcasting, and Moore did not mention a company name when he conducted the survey because the corporate charter had not yet been issued.

9. Consequently, it is concluded that Bay is not disqualified from being a licensee under the misrepresentation issue. It is recognized that Moore testified that he interviewed Haas and Haas flatly denies that he was contacted by Moore or anyone else concerning a proposed radio station during early 1966 or late 1965. However, there is no corroborating evidence permitting a resolution of this contradiction. It is possible, of course, that one witness was correct and the other unintentionally mistaken.

*Issue 5—Financial Issue*

10. Bay will require $107,922.47 to construct its proposed station and operate it for one year. The First National Bank of Slidell, Louisiana, has agreed to loan Bay $125,000 with payments of interest and principal being deferred for one year. The bank letter specifies that W. C. Garrett is to endorse Bay's note and Garrett has agreed to do so. It is, therefore, concluded that Bay is financially qualified.

*Issue 6—Ascertainment of Community Needs Issue*

11. After its initial survey and after designation, Bay supplemented its original ascertainment efforts and proposed programming with a new survey conducted in 1969. With release of the *Primer* in February



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1971, Bay again surveyed community leaders and random selectees, listed needs ascertained and proposed more detailed programs to meet the needs found.

12. Demographic data were set forth in detail, and leaders, as well as persons selected at random were interviewed in Bay St. Louis and in Kiln, Pass Christian, Waveland and Pearlington, surrounding towns. Significant groups in the area were identified, including those relating to government, religion, education, health-hospital, fraternal, professional, business, law enforcement, minority-poverty and civic activities. Thirty-one leaders from these categories were interviewed, and a sampling of the general public was taken at random, which included representatives of ethnic and minority groupings, both sexes, and various ages, economic strata and economic levels.

13. Bay listed the problems suggested by community leaders and by the general public. It has proposed specific programs relating to religion, public affairs, instruction, area activities and sports. Days of the week, times, and durations of these programs are specified. They will deal with such community needs as youth problems, housing and real estate, unemployment, crime and drug abuse. Restoration and rehabilitation of the Bay St. Louis area (after the devastation of Hurricane Camille) will be a major topic, and other local problems will be treated in panel-discussion and listener-participation programs. Applicant has made a realistic attempt to propose programs in response to the needs it ascertained in its surveys. Therefore, it is concluded that Bay Broadcasting has sustained its burden under the ascertainment of community needs issue.

14. Upon the basis of the entire record in this proceeding and the foregoing findings and conclusions, it is concluded that the public interest, convenience and necessity will be served by a grant of the Bay Broadcasting Corporation application.

Accordingly, IT IS ORDERED that, unless an appeal to the Commission is taken by any party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Bay Broadcasting Corporation for a construction permit for a new standard broadcast station at Bay St. Louis, Mississippi, to operate on 1190 kHz with a power of 5 kilowatts, non-directional, daytime only, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH, *Administrative Law Judge.*

F.C.C. 73-459

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| In Re | |
|---|---|
| CABLE TV CO. OF YORK | |
| SPRINGETTSBURY TOWNSHIP, PA. | CAC-469 (PA784) |
| DALLASTOWN, PA. | CAC-470 (PA782) |
| SPRING GARDEN TOWNSHIP, PA. | CAC-471 (PA781) |
| WEST YORK BOROUGH, PA. | CAC-472 (PA785) |
| NORTH YORK BOROUGH, PA. | CAC-473 (PA783) |
| WEST MANCHESTER TOWNSHIP, PA. | CAC-474 (PA876) |
| YORK TOWNSHIP, PA. | CAC-475 (PA877) |
| MANCHESTER TOWNSHIP, PA. | CAC-476 (PA878) |
| For Certificates of Compliance | |

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1973; Released May 9, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. Cable TV of York, Pennsylvania has applied for certificates of compliance to add the television broadcast signals of WPHL-TV (Ind., Ch. 17) and WKBS-TV (Ind., Ch. 48), both of Philadelphia, Pa., to its eight existing cable systems in Springettsbury Township, Dallastown, Spring Garden Township, West York Borough, North York Borough, West Manchester Township, Manchester Township, and York Township, all suburbs of the city of York. In its application, Cable TV requests a temporary waiver of Section 76.251(c) of the Rules so that it need not now provide a public access channel for each community. The applications are unopposed.

2. Cable TV has operated a cable system in the city of York since 1967, and is authorized [1] to carry television signals from the Harrisburg-Lebanon-Lancaster-York, Baltimore, Philadelphia, and Washington, D.C. markets. Subsequently, Cable TV commenced operating its systems in the suburban communities, served by the common head end with its York city system. The distant signals, of course, with the exception of the authorized WBFF-TV (Ind., Channel 45, Baltimore)

[1] See *Susquehanna Broadcasting Company*, 7 FCC 2d 578 (1967), for waiver of hearing provisions of former Section 74.1107 of the Rules and authorization to carry distant signals. Later in 1967, authorizations (CATV 100-253, and CATV 100-303) were requested to carry the same signals in the York suburban communities. The requests were not reached for processing by the staff before the interim procedures in Docket 18397 were adopted by the Commission; because the requests were not consistent with the carriage proposals in Docket 18397, no further action was taken respecting them before the enactment of our new rules. These requests have been dismissed in accordance with the policy expressed at paragraph 114(c) of the *Cable Television Report and Order*, (Docket 18397) 36 FCC 2d 141 (1972).

have been screened from carriage on the suburban systems. These systems now carry the following television signals:

WITF–TV Educ., Ch. 33, Hershey, Pa.;
WBAL–TV NBC, Ch. 11, Baltimore, Md.;
WGAL–TV NBC, Ch. 8, Lancaster, Pa.;
WSBA–TV CBS, Ch. 43, York, Pa.;
WPTA–TV ABC, Ch. 27, Harrisburg, Pa.;
WMAR–TV CBS, Ch. 2, Baltimore, Md.;
WJZ–TV ABC, Ch. 13, Baltimore, Md.;
WLYH–TV CBS, Ch. 15, Lancaster-Lebanon, Pa.;
WHP–TV CBS, Ch. 21, Harrisburg, Pa.;
WBFF–TV Ind., Ch. 45, Baltimore, Md.

3. There are two issues raised by Cable TV's applications. First, whether the television signals proposed to be carried are consistent with our rules. Secondly, whether, in the circumstances of this case, the provisions of Section 76.251(c) of our rules, relating to the supplying of public access channels, should be waived.

4. These cable systems are located within the Harrisburg-Lancaster-Lebanon-York major television market, #57. Our rules (Section 76.63(a), read in connection with Section 76.61(b)(2)) provide that systems located in one of the second fifty major television markets may carry a minimum complement of three full network stations and two independent stations. These eight systems now carry the signal of one independent station, WBFF–TV, Channel 45, Baltimore, Maryland, a station which, under our new rules, would not have to be carried on the systems.

5. Cable TV states that Baltimore independent station WBFF–TV is carried as a "grandfathered" signal and is authorized because it places a Grade B contour over the communities of the systems. It maintains that it is entitled to one independent signal to meet the minimum service requirements of Section 76.61(b) and also to another independent signal as a "bonus" under 76.61(c). The two additional signals, it is argued, would be in "substantial compliance" with the Commission's Rules. Existing systems, however, are not automatically entitled to carry the specified number of additional or "bonus" independent stations. We look to see if the minimum signal complement has to some extent already been satisfied by the carriage of a signal which, under our new rules, is not a market signal or one significantly viewed. This signal is then subtracted from the number of additional signals to which the system would otherwise be entitled. WBFF–TV, regardless of its contour, is not a "must carry" station on the systems in question, and thus its present carriage counts against the number of independent signals these systems may now import. Cable TV has acknowledged that our Rules might be so interpreted and, in that event, expressed a preference for the carriage of WPHL–TV. Carriage of this station would be consistent with our Rules. As a consequence of the carriage of WPHL–TV, however, Cable TV is obliged to provide, pursuant to Section 76.251(c), a public access channel for each of its eight suburban systems. Cable TV has requested temporary relief from this obligation.

6. As we stated in our *Memorandum Opinion and Order on Recon-*

*sideration of the Cable Television Report and Order*, we will, on appropriate showing, permit conglomerate systems, served by a single headend, which were in operation prior to the effective date of the new rules, to fulfill the various access requirements, until 1977, by the shared use of a channel or channels. (See *Gerity Broadcasting Co., et al.*, 36 FCC 2d 69). Cable TV, however, argues that it will have great difficulty providing even one public access channel for shared use by all eight suburban systems. First, of course, regardless of the number of open channels or theoretical channel capacity of the newer suburban systems. Cable TV explains that because of the single headend feed, channel space for an access channel will have to be found on the city of York system. This system, it is noted, is financially and technically incapable at this time of expanding its channel capacity in order to add another channel of programming. Furthermore, Cable TV argues that because of the shared use of the channels in the York system it would be difficult to free one channel by eliminating any of four duplicating distant network stations, absent considerable and disruptive re-scheduling. In addition it is suggested that the elimination of any of these stations would conflict with the Commission's finding in *Susquehanna* that their carriage was in the public interest.

7. The problem presented in this case is one common to a number of existing cable television systems. Thus, our disposition of this matter can be expected to affect other conglomerate systems which have applied or will apply for certificates of compliance. We have chosen not to disturb existing carriage schemes by the implementation of the new rules. We have also chosen, however, in the public interest, to require certain access services of major market systems as a *quid pro quo* for taking advantage of the new rules to add distant independent signals. And while we have generally adopted a most liberal approach to enforcing this requirement, recognizing the technical difficulties faced by some established systems, we are not inclined in this case to grant a blanket waiver.

8. The Commission will not require Cable TV to expand its channel capacity before March 31, 1977 (See Section 76.251(c)) nor will we require it to shuffle, much less eliminate, any stations it is now carrying.[2]

9. We do require, however, that Cable TV provide its eight suburban systems with at least one public access channel if it chooses to carry WPHL–TV on those systems at this time. This is not a case involving a group of systems located in the far reaches of a major market where populations are small and the requirement of access might not be justified. (See paras. 147, 148, *Cable Television Report and Order*). The total population of the communities served by the eight systems around York is more than 70,000. While at present the subscribers to these systems total only 3,794, this figure may reasonably be expected to in-

[2] We do note, however, in response to Cable TV's assertions, that our decision in *Susquehanna* clearly does not stand for the proposition that the elimination of a distant network station would be contrary to the public interest. The company may, of course, cease carriage of such stations if it chooses.

crease substantially.[3] If at least one public access channel cannot or will not be provided to these subscribers, we believe that to grant this application would not serve the public interest. Should Cable TV find that it is able to provide a public access channel for the systems in question, and so informs the Commission within 90 days, a certificate of compliance will be granted by our Cable Television Bureau.

Accordingly, IT IS ORDERED, That a partial waiver affording temporary relief from Section 76.251(c) of the Rules, and a grant of the above-captioned applications for Certificates of Compliance, ARE DENIED subject to the condition stated above.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] These eight systems have only been operating since April of 1970. The present populations of the communities are:

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|---|---|
| Springettsbury Township | 19,204 |
| Dallastown | 3,566 |
| Spring Garden Twp | 12,372 |
| West York Borough | 5,220 |
| North York Borough | 2,018 |
| West Manchester Twp | 12,151 |
| Manchester Twp | 6,919 |
| York Township | 12,622 |

F.C.C. 73–474

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In Re Applications of | |
| JAMES R. REESE, JR., AND JANE M. REESE D.B.A. CLIFTON FORGE RADIO, CLIFTON FORGE, VA. | Docket No. 19489<br>File No. BP–19057 |
| ALLEGHANY-HIGHLANDS RADIO, INC., CLIFTON FORGE, VA. | Docket No. 19490<br>File No. BP–19099 |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

(Adopted May 7, 1973; Released May 9, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE DISSENTING AND ISSUING STATEMENT; COMMISSIONER WILEY NOT PARTICIPATING.

1. We have before us for consideration: (i) an application for partial review of a Review Board Memorandum Opinion and Order, FCC 72R–343, released November 28, 1972, filed December 5, 1972, by Clifton Forge Radio; (ii) a supplement to (i) filed December 12, 1972, by Clifton Forge Radio; (iii) an opposition to (i) filed December 14, 1972, by the Broadcast Bureau; and (iv) a reply to (iii) filed December 27, 1972, by Clifton Forge Radio.

2. James R. Reese, Jr., a partner in Clifton Forge Radio, was the licensee of Station WCFV in Clifton Forge, Virginia from 1959 to 1965, at which time he sold the station to Image Radio, Inc., subject to certain notes on which Reese remained primarily liable. Subsequently, Image became delinquent in its payments on the notes, forcing Reese to buy in the physical assets of the station at a foreclosure sale. Station WCFV went off the air on March 10, 1971, the date of the foreclosure sale, and its pending license renewal application was denied by us on May 28, 1971, (see *Image Radio, Inc.*, 29 FCC 2d 822). On July 20, 1971, the call letters WCFV were deleted. After Reese became aware of Image's financial situation, but before its renewal application had been denied, he began preparing an application for the frequency (1230 kHz) utilized by WCFV. He subsequently submitted this application along with a request for authority to operate WCFV on an interim basis. By Memorandum Opinion and Order, FCC 71–862, released August 25, 1971, we accepted Reese's application for a construction permit but deferred action on his request for interim operating authority, stating:

> 5. On the question of interim operating authority, in anticipation of the possible filing of competing applications, the Commission believes that the better course would be to defer any consideration of interim operation at this time. The Commission will, however, in the event other applications are filed, entertain a joint proposal for interim operation in which all competing applicants may participate (FCC 71–862 at page 2).

3. Alleghany-Highlands later submitted its application for the frequency as well as a proposal for interim operating authority. By Memorandum Opinion and Order, 34 FCC 2d 763, released April 27, 1972, we designated the mutually exclusive applications for hearing and denied all proposals for interim operating authority. Thereafter, on July 19, 1972, the applicants filed an agreement with the Administrative Law Judge wherein Clifton Forge agreed to withdraw its application. In return, Alleghany-Highlands agreed to reimburse Clifton Forge for expenses incurred in this matter and to purchase the physical assets of WCFV. The total purchase price and reimbursement was not to exceed $47,000. The Broadcast Bureau contested two expense items in the agreement: (1) a claim of $585.65 allegedly incurred by Clifton Forge prior to May 28, 1971, and (2) expenses of $2,402.54 which Clifton Forge incurred in prosecuting its request for interim operating authority. By Memorandum Opinion and Order, FCC 72M–1081, released August 28, 1971, the Judge rejected the Bureau's contentions, approved the agreement as presented, and dismissed Clifton Forge's application. Concerning the claim for expenses incurred by Clifton Forge in connection with its application for interim authority, the Judge stated:

> The purpose of 47 U.S.C. 311(c), and Rule 1.525 which implements it, are to prevent abuse of the Commission's processes by parties seeking to profit from the mere fact that they have applications pending. Here, the application for interim authority was an integral part of Clifton Forge's plan for restoration of the service lost when Image went silent. . . . Hence, expenditures on behalf of the interim application were made in connection with the instant application within the meaning of 47 U.S.C. 311(c) and no element of abuse of process is suggested.

The Bureau filed a partial appeal with the Review Board contesting the Judge's conclusions on these points, and by Memorandum Opinion and Order, FCC 72R–343, released November 28, 1972, the Board reversed in part the Judge's decision but also affirmed the decision in part.

4. The Board affirmed the Judge in regard to the $585.65 of expenses incurred prior to May 28, 1971, stating that there is no dispute these expenses were incurred in connection with Clifton Forge's application which was being dismissed. The Board further held that although the expenses were incurred prior to the denial of Image's license renewal application, the particular and unique circumstances of this case make such expenses prudent and legitimate.

5. As to the claim of $2,402.54 for expenses incurred in connection with Clifton Forge's application for interim operating authority, the Board held that Section 311(c)(3) of the Communications Act and Section 1.525(a) of the Commission's Rules do not authorize reimbursement to a withdrawing applicant for expenses that are not incurred in connection with the application that is in the hearing. The Board further held that the filing of the interim application by Clifton Forge was not necessary to prosecute its application for permanent authority, and in light of this, the claimed expenses must be disallowed.

6. Clifton Forge (hereinafter petitioner) asserts that its application for partial review (hereinafter petition) is concerned only with the Board's disallowance of the $2,402.54 claim, and that no dispute remains concerning the $585.65 claim. The Bureau takes exception to this

last statement and restates its position that expenses incurred by a prospective applicant before an existing licensee's license has been terminated are speculative expenses which are incurred at his own risk and in no way can they be considered legitimate and prudent expenses which are reimbursable. In light of this, the Bureau requests the Commission to review the claim for $585.65 if the Commission grants review to petitioner.

7. As our discussion above indicates, there are presently no factual matters in dispute, only questions of law involving the application of 47 U.S.C. 311(c) to the facts of this case. Therefore, a brief statement of the purpose of Section 311(c) and our interpretation of its requirements is in order. The Commission's interpretation of Section 311(c) is discussed at length in *United Church of Christ* v. *FCC*, 465 F. 2d 519 (U.S. Ct. App. D.C. (1972)).

8. In that case, the Court noted that the potential for abuse of reimbursement agreements through buy-outs of competitors or payoffs to those filing frivolous applications is an evil which Congress dealt with in enacting Section 311(c), which requires us to give strict scrutiny to the *bona fides* of the parties and the legitimacy of the reimbursement. Since the enactment of Section 311(c), we have been asked to approve withdrawal and reimbursement agreements in situations to which the Act does not explicitly apply. In doing so, we have developed the principle that in such situations the spirit of Section 311(c) is applicable.

9. In this case we find ourselves in agreement with the Judge's statement quoted in paragraph 3, *supra*, concerning the reimbursability of petitioner's expenses incurred in connection with its application for interim operating authority, and conclude that such expenses are legitimate, prudent and reimbursable. Similarly, we agree with both the Judge's and the Review Board's conclusions regarding the reimbursability of petitioner's legitimate expenses incurred before Image had its license renewal application denied. Therefore, we shall not disturb that portion of the Board's decision.

10. ACCORDINGLY, IT IS ORDERED, That the application for partial review of the Review Board's Memorandum Opinion and Order, FCC 72R–343, released November 28, 1972, filed by Clifton Forge Radio on December 5, 1972, IS GRANTED; that the above mentioned Memorandum Opinion and Order IS MODIFIED to the extent indicated in paragraph 9, *supra;* that the joint agreeemnt filed July 19, 1972, by the applicants IS APPROVED; and that the application of Clifton Forge Radio (File No. BP–19057) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

The issue presented by the application for partial review of a Review Board ruling (38 FCC 2d 293, released November 28, 1972), filed by Clifton Forge Radio, is simply stated:

May a dismissing applicant in a comparative broadcast proceeding who has entered into a joint reimbursement agreement with its competitor be reimbursed

for expenses incurred in the prosecution of an application for interim authority, which was earlier denied by the Commission?

The Review Board, in addressing the question in the context of the joint reimbursement agreement between Clifton Forge Radio and Alleghany-Highlands Radio, Inc., disagreed with the Administrative Law Judge's decision below and concluded that neither Section 311(c) of the Communications Act nor Section 1.525(a) of the Commission's Rules authorizes reimbursement to the withdrawing applicant—Clifton Forge Radio—for expenses that have not been incurred in connection with its pending permanent authority application. The Board, in effect, held that the filing of an application for interim operating authority by Clifton Forge Radio was not necessary to enable the dismissing applicant to prosecute its application for permanent authority and that, therefore, the claimed expenses must be disallowed. The majority disagrees with the Board's rationale and, citing the Court of Appeals' decision in *Office of Communication of the United Church of Christ* v. *FCC*, —— U.S. App. D.C. ——, 465 F. 2d 519 (1972), and the Judge's conclusions below, finds that the "spirit of Section 311(c) is applicable" here, that the application for interim authority was an integral part of Clifton Forge Radio's plan to restore the deleted AM facility and that expenditures made on behalf of the interim proposal are reimbursable since they were incurred in connection with the permanent authority proposal, were legitimately and prudently expended and involved no element of abuse of process. I cannot agree with the majority's position, and, as a result, I have dissented to the reversal of the Review Board's ruling.

I believe that the Board's holding that the filing of the interim proposal was not an essential ingredient in the prosecution of Clifton Forge Radio's application for permanent authority is a correct interpretation of the phrase—"in connection with preparing, filing and advocating the granting of his application"—contained in Section 311(c)(3) of the Act. The fact that both applications may have been part of one "package", as Clifton Forge Radio claims in its appeal, has no relevance to the question of whether expenses incurred in the prosecution of an interim proposal are reimbursable here since neither application was dependent upon the successful prosecution of the other and since each application could be and was, in fact, acted upon separately. Moreover, the only *pending* application of Clifton Forge Radio at the time of the submission of the joint reimbursement agreement was the proposal for permanent authority, and the agreement itself specifically provided for reimbursement of expenses incurred in the prosecution of that application.[1] In contrast, the joint agreement in *Pike-Mo Broadcasting Co.*, 2 FCC 2d 946, 7 RR 2d 281 (1965), upon which the appellant relies, expressly contemplated the reimbursement of expenses incurred in the prosecution of applications for both interim and permanent authority, and the interim proposal was still in a pending status when the agreement was filed

[1] By Memorandum Opinion and Order, 34 FCC 2d 763, 24 RR 2d 212 (1972), the Commission designated the mutually exclusive applications of Clifton Forge Radio and Alleghany-Highlands Radio, Inc., for comparative hearing and dismissed requests by both applicants for interim authority to operate the facilities of former Station WCFV in Clifton Forge, Virginia. In its designation Order, the Commission noted that it had earlier denied the individual request of James R. Reese, Jr., a partner in Clifton Forge Radio, for interim authority to operate WCFV.

with the Commission. In addition, past precedent in regard to the Commission's disallowance of expenses attributable to rule making proceedings which preceded the filing of permanent authority proposals clearly supports the Board's position in this case. See *Dirigo Broadcasting, Inc.*, FCC 65R–186, 5 RR 2d 735; *cf.*, *Sidney E. Young*, 6 FCC 2d 450, 9 RR 2d 166 (1967).

While it is true, as the majority notes, that the Commission has been asked to approve dismissal-reimbursement agreements in situations not specifically covered by provisions of the Communications Act and that we have applied the "spirit of Section 311(c)" in such cases, I cannot agree that that precedent or the Court's decision in the *United Church of Christ* proceeding, *supra*, requires reversal of the Board's ruling. For one thing, the statutory provisions of Section 311(c) clearly apply in the instant situation—where one applicant is withdrawing from a comparative hearing upon reimbursement of its expenses by the other mutually-exclusive applicant and where the dismissal agreement is limited in scope to the pending proposal for permanent authority. Moreover, the Court's decision in *United Church of Christ* involved review of a Commission Order that attempted to prohibit voluntary reimbursement in petition to deny situations—a topic not addressed by Congress in Section 311(c) or elsewhere—and did not focus on the statutory provision interpreted by the Board.[2] In addition, the Board conceded that legitimate and prudent expenses incurred in connection with an interim proposal are not necessarily non-reimbursable *per se* and held only that, in the context of this case, the filing of the interim authority application was not an essential ingredient in the prosecution of Clifton Forge Radio's application for permanent authority.[3] In such circumstances, I cannot find that the Board's ruling conflicted with statute or rule or established precedent, and I would affirm its holding. I am afraid that, in the majority's apparent zeal to apply the "spirit of Section 311(c)", it has effectively ignored the Congressional mandate contained therein and has undermined the integrity of Commission precedent in this area of statutory interpretation.

I respectfully dissent.

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[2] By *Notice of Inquiry and Proposed Rule Making in Docket No. 19518*, FCC 72–473, 37 FR 11592, the Commission is investigating the broad issue of whether the public interest would be served by payment of future expenses to a group which has petitioned to deny a renewal, transfer or assignment application, but has agreed with a licensee to serve as a consultant to the station involved upon dismissal of its petition to deny. In its *Notice*, the Commission specifically referred to the Court's decision in *United Church of Christ*.

[3] In *Sidney E. Young, supra*, the Commission approved a dismissal agreement which provided for reimbursement of legal fees attributable to a rule making proceeding where the permanent authority application had been on file prior to a Commission revision of the channel allocation involved. The Commission revision effectively required the dismissing applicant to change his proposal, abandon it or seek some remedial action, and this factor was cited to distinguish the *Young* case from the situation where a party sought a channel allocation (or revision in channel allocation) for the purpose of filing an application at some future time.

F.C.C. 73-444

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In Re Request by
COMMUNITY COLLEGE OF BALTIMORE, BALTIMORE, MD.
For Additional Waiver of Section 75.503 (d) of Commission Rules

APRIL 25, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
COMMUNITY COLLEGE OF BALTIMORE,
RADIO STATION WBJC-FM,
*2901 Liberty Heights Avenue,*
*Baltimore, Md. 21215*

GENTLEMEN: Section 73.503(d) of the Commission's Rules, pertaining to educational FM broadcast stations states in part: "Each licensee shall furnish a nonprofit and noncommercial broadcast service . . . (N)o announcements promoting the sale of a product or service shall be broadcast in connection with any program."

By letter dated May 12, 1971, the Commission granted your first request for a waiver of the provisions of Section 73.503(d) to permit the broadcast of a series of "oldtime" radio programs, including commercials, that were originally broadcast on commercial stations in the period from 1937 to 1959. You had represented to the Commission that you thought that the commercial messages, as well as the program content, had historical significance and that many of the commercial announcements were for products no longer marketed. The program series was provided, without consideration, by the Radio Historical Society of America.

You subsequently asked for an extension of the waiver, which was granted by the staff until the end of May, 1972. The staff's letter notified you that the Public Health Act of 1969, 15 U.S.C. §§ 1331–1338, prohibits the advertising of cigarettes on radio and television.

By letter dated Februray 21, 1973, you requested a further extension of the waiver of Section 73.503(d), effective retroactively to May, 1972. The staff requested further information and, in light of all the information you have provided, it appears: that you seek an extension of the waiver through May, 1974; that you continued to broadcast commercial announcements in connection with "oldtime" radio programs after your waiver had expired; that in the period following the expiration of the waiver, from June 1, 1972 to March 7, 1973, you broadcast 36 programs containing a total of 85 announcements; that 69 of the 85 commercial announcements that were broadcast, based on the brief description that you have provided, appear to be for products or companies that still advertise; and that despite the notice given to you as to cigarette commercials, 6 of the commercials advertised cigarettes.

By broadcasting commercial announcements on a noncommercial radio station in the period from June 1, 1972 through March 7, 1973, and by broadcasting cigarette commercials, the Commission believes that you have not exhibited the degree of responsibility expected of a licensee. While no further action is contemplated by the Commission with respect to these violations, you are cautioned that further violations may result in the imposition of appropriate sanctions.

Waivers of Section 73.503(d) that were granted in the past have been for limited periods of time or for a discrete series of programs. An ongoing series of programs, such as you propose, was not contemplated when the Commission acted on those waiver requests. Moreover, the Commission has, in another context, expressed its concern as to commercial "clutter" on educational broadcast stations. *Noncommercial Educational Stations*, 26 FCC 2d 339, 342–3, 20 RR 2d 1602, 1607 (1970). The Commission believes that an ongoing program series creates such "clutter." In view of the above, your request for an extension of a waiver of Section 73.503(d) is denied. You may, of course, continue to present the "oldtime" radio series if the commercial announcements are deleted.

The Commission recognizes that older commercial announcements may have historical interest and that educational stations may wish to present programs that include such announcements. However, the Commission is of the view that these historical interests can be served by limited waivers, and that the blanket, long-term waiver you propose is not required. Thus, you may wish to submit a waiver request for a more limited period of time. It should be noted, however, that the Commission has no authority to waive the provisions of the Public Health Smoking Act of 1969, as amended.

Commissioner Johnson concurring in the result; Commissioners Reid and Wiley absent.

By Direction of the Commission,
Ben F. Waple, *Secretary*.

F.C.C. 73-445

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In the Matter of ESTABLISHMENT OF POLICIES AND PROCEDURES FOR THE USE OF DIGITAL MODULATION TECHNIQUES IN MICROWAVE RADIO AND PROPOSED AMENDMENTS TO PARTS 2 AND 21 | Docket No. 19311 |

NOTICE OF PROPOSED RULEMAKING

(Adopted May 3, 1973; Released May 8, 1973)

BY THE COMMISSION:

1. A *Notice of Inquiry* in the above-captioned matter was released on September 15, 1971, 31 FCC 2d 716. The purpose of the Inquiry was to gather data on what effects digital transmission techniques would have on current microwave transmission methods from the standpoint of interference and the necessity to modify our rules to permit utilization of digital transmission techniques. In order to elicit a more comprehensive response we asked a number of specific questions on various points. Comments were filed on or about November 16, 1971 and reply comments on or about January 17, 1972 by various associations, carriers, manufacturers and users (see Appendix A for a list thereof).

THE COMMENTS RECEIVED

2. The majority of those commenting conclude that digital modulation techniques could and should be introduced into the microwave frequencies below 15 GHz and that this could be accomplished without causing any detrimental effects to current operations if appropriate safeguards are applied. In the bands above 15 GHz all respondents agreed that digital modulated systems should be the rule rather than the exception. A number express the belief that the use of digital transmission techniques will be as efficient in the utilization of the frequency spectrum as the present methods and perhaps more so, especially after more experience is obtained and improvements are incorporated into the equipment.

3. The coexistence of these different modes of operations in the same bands is dependent upon the users of digital techniques employing certain precautions to reduce the possibilities of degrading the performance of analog systems. Under such circumstances American Telephone and Telegraph Company (AT&T or Bell), Data Transmission Company (Datran), Nippon Electric Company (Nippon) and others do not foresee interference between digital and analog systems as being any greater than the interference experienced between analog systems.

4. The MCI Carriers (MCI) and General Telephone and Electronics Co. (GTE) do not, however, share the views of many other participating parties in regard to permitting digital transmission in the frequency bands between 2 and 11 GHz. According to these respondents, especially MCI, there is not enough known about the impact such operations will have on existing systems and therefore, if permitted in these bands, digital operation should initially be on developmental basis. According to MCI this developmental program should proceed under the guidance of the Commission and is justified considering: (1) the inefficiency existing digital test installations have shown in spectrum usage; (2) the extent of disagreement among design engineers, users, manufacturers and other interested parties as to the technical features, economy, efficiency and reliability of digitital modulations; and (3) the potential for harmful interference to existing FDM–FM (frequency-division multiplex-frequency modulation) systems resulting from such operations. It states:

"Against these unknowns, another working premise is suggested. We believe that through a development program fully monitored by the Federal Communications Commission relative to digital transmission techniques some of the answers to the unknowns will be forthcoming. We believe this to be an eminently desirable and worthwhile effort. It will help to remove the many uncertainties regarding digital transmission techniques. Focus on the advantages versus the disadvantages should become much clearer and issues such as the character, quality and kind of bit streams over what amount of bandwidth should be more readily determinable after a phased and carefully coordinated and fostered developmental program."

5. GTE contends that there has not been any control on the interfering characteristics of developed digital systems and that the efficiency in which the bands below 13 GHz are currently being employed will be endangered if digital operations are introduced precipitously. GTE acknowledges that digital facilities could be developed which could coexist with conventional microwave systems. However, it does not feel that development will proceed in this manner unless the Commission initially establishes specific guidelines to direct the development of necessary controls on digital operations. Furthermore, it states that even though digital systems may be designed to exist in the current communication environment, such systems will most likely have a greater interference potential to FDM–FM systems than FDM–FM systems would have with respect to each other.

6. It is generally the consensus that the higher frequency bands should be considered primarily for digital transmission. Some of the reasons given are the lack of existing use in those bands, the absence of technical restraints, the ability of digital systems to endure a greater degree of interference, and its more economical use of the frequency spectrum in the higher bands. According to AT&T there are two modulation methods which utilize bandwidth expansion techniques that will achieve maximum information capacity, and they are digital angle modulation (FSK and PSK) [1] and high-index analog modulation. AT&T states:

"Both modulation methods show interference resistance that increases nonlinearly with bandwidth expansion. Because of the large number of repeaters

[1] Frequency shift keying and phase shift keying.

required, analog modulation has the disadvantage of accumulation of degradation, whereas digital modulation is almost free from accumulation of distortion and noise. This effect suggests predominantly digital development of the bands above 15 GHz."

7. MCI proposes that these higher radio frequency bands be utilized for implementation of a digital developmental program and that any decision on this matter be deferred until about 1975 to give the Commission an opportunity to review information derived from actual operations and to base its conclusions on more concrete evidence than that offered by the comments received in response to this docket.

8. It is generally recognized that in a band shared between analog and digital systems, the analog facility is more susceptible to interference from the digital than the reverse. AT&T, Datran, Nippon and others conclude that an introduction of digital modulated microwave systems into the present FDM–FM microwave environment would not be harmful to the current communication environment and would not be inefficient in the use of the frequency spectrum. However, they contend that the achievement of coexistence between analog and digital systems must be accompanied by some technical limitations on spectrum shape and density of the digitally modulated signals since digital signals tend to have greater sideband power levels than those of low index FDM–FM systems and to occupy the channel width more fully. According to AT&T, Datran and Nippon, the digital signals must be filtered to eliminate the radiation of a broader bandwidth signal than required by the reciever.

9. Another factor pointed out by several respondents is the interference potential of the energy produced by the repetitive bit patterns in the digital stream. As a guard against interference produced by this characteristic, AT&T recommends the use of a scrambling device which will randomize the repetitive bit sequences and thereby reduce the interference potential. AT&T also points out that frequency coordination as required pursuant to Rule Section 21.100(d) will also assist in insuring compatibility between digital and analog facilities, but it recognizes that the parties involved will have to develop new technical standards governing permissible carrier to interference ratios.

10. According to several respondents, digital systems, despite a low channel capacity, will be as effective, in terms of frequency usage, in transmitting voice as current analog systems. The basis for this conclusion seems to rest on the ability of digital systems to transmit two channels on the same frequency by cross polarization techniques and the possibility of placing carrier frequencies of digital systems on closer spacing. However, MCI points out that it is not accurate, by way of comparison to analog systems, to conclude that twice as many digital channels are available through the use of cross polarization since cross polarization frequency enables two FDM–FM channels on the same frequency to co-exist in close proximity (but not on the same path).

11. In addition to general comments on digital modulation, we also solicited comments on a number of specific subsidiary questions relating largely to possible restraints. The responses to those questions are summarized below in very brief fashion.

(a) What is the expected technical impact of digital modulation systems on conventional FM operations?

As noted above the majority of the respondents agree that some harmful interference could occur from an introduction of digital transmission systems into the present radio environment but that this could be avoided by initiating various controls on the power spectrum of the digital signals.

(b) If problems exist, can they be controlled? How?
(c) What technical limitations should be imposed?

Avantek, AT&T, Nippon and others suggest that filters be made a requirement for operating in the digital mode. AT&T recommends that these filters be capable of reducing the power in the spectrum beyond the first nulls of the emission spectrum 50–55 dB below that at the center of the spectrum for frequency bands to be shared with analog systems and 35–40 dB for frequencies which would be primarily for digital systems. However, Nippon appears to take the position that a 25–30 dB suppression of the energy beyond the first nulls would be adequate for all frequency bands. Raytheon, EIA and Vicom suggest the establishment of power density spectrum curves which can be calculated for various bands and channel loadings. In addition, Avantek, AT&T, and Nippon recommend pseudo random noise sources (scramblers) be required when PSK modulation techniques are employed in frequency bands below 15 GHz. GTE recommends that all carriers proposing the use of digital modulation techniques be required to include in their coordination information a full description of the spectral characteristics of the proposed facilities.

(d) Should this transmission technique be authorized in all microwave bands . . .?

Most of the comments favor using digital transmission techniques in all microwave bands because of its inherent advantages over techniques currently employed by conventional microwave systems. However, a few of the comments indicate some reservations about allowing full use to occur at this stage of digital developmental and suggest only authorizing developmental operations. GTE suggests that digital transmission be excluded from the bands below 13 GHz for local distribution purposes except on an emergency basis with the understanding that such operation would be transferred to a band above 13 GHz once adequate frequency allocations and equipment become available.

(e) Would it be advantageous to establish a minimum required voice channel or bit capacity for digital systems? If so, what should be the minimum capacity? Should said capacity be related to the occupied bandwidth? What relationships would be appropriate?

A number of comments conclude that it is too early to establish minimum capacity levels for digital modulation use over microwave since its development is still in infancy, with many improvements to come. Avantek's approach to this question, if minimums are to be established, would entail specifying discrete capacities for only the 4 and 6 GHz common carrier bands. The suggested minimums are 288 voice circuits

or 20 Mb/s of data per assigned frequency and polarization. In general, Avantek, Department of Defense, and others suggest a relationship between occupied bandwidth and channel capacity of approximately one Hertz per bit/second of digital rate. GTE recommends granting one channel regardless of the initial load, but before additional channels are authorized it must be shown that the previously authorized channel has been utilized to the maximum extent.

(f) If phase shift keying is proposed, should there be a lower limit on the number of phases employed? What is the optimum trade off of bandwidth reduction by multi-phase modulation versus greater sensitivity to interference of such modulation methods?

Many respondents point out that PSK modulated systems (of four phases or more) tend to require less bandwidth for transmission of information as the number of phases are increased, but the increase in number of phases also requires a greater amount of power for system operation, thereby creating a greater source of potential interference. They also state that an added effect of increasing the number of phases is the greater susceptibility to interference these systems acquire. The selection of the number of phases not only relates to the optimum trade-off of bandwidth reduction versus greater sensitivity to interference but also depends on the interference environment, the associated cost of increasing complex equipment, and the desired bit and error rates. For these reasons the majority of the comments recommend that no specific limitation regarding the number of phases be established, although many believe that at the current state of development four phase modulation is probably nearest to optimum. Taking an exception to this view is the Utilities Telecommunications Council. It does not suggest a definite number of phases but does indicate that it should be some number greater than two because two phase operation is wasteful of bandwidth.

(g) Should regeneration of the bit stream be required at every relay, (or at every "n" relay) in the interest of making systems less sensitive to interference?

Generally, the comments recommend that regeneration be left as a prerogative of the system designer and not be determined by rule. It is contended that to require regeneration at every relay may prove to be uneconomical for long-haul systems (although it may be desirable in some cases) and that other factors must be considered, such as the tendency of the system to be limited by interference and the interference environment in which the system will exist.

(h) Should digital operations be confined to certain locales or to certain services (i.e. Pt/Pt microwave fixed, satellites, private microwave, etc.)?

There is general opposition to confining digital operations to any particular locale or service since such limitations have the effect of denying some users and segments of the public the benefits of this mode of operation. The national Association of Business and Educational Radio is very much opposed to restrictions or limitations on the use of

digital equipment in any of the private microwave services. It claims that in many instances digital microwave is performing services not yet available from common carriers.

(i) Would it be in the public interest to limit digital transmission in the carriage of digital data only (prohibit voice carriage over such facilities)?

The general consensus of those commenting is that there should be no flat prohibition on the transmission of voice communications over digital facilities. MCI states that some limitations may be advisable when voice traffic exceeds some modest volume because of inefficient spectrum efficiency. Datran takes the view that technological advances are likely to increase the efficiency of digitized voice transmissions.

(j) What considerations should be given and methods employed in calculating necessary bandwidth required for microwave systems employing digital modulation techniques. The various keying methods, i.e. phase shift keying, frequency shift keying, etc. should be considered.

Few definitive suggestions for calculating necessary bandwidth were received. Several, including EIA, suggested that each manufacturer be required to calculate the necessary bandwidth for his equipment (presumably at the time of type acceptance) and justify the method of calculation. However, AT&T, Nippon, Datran and several others do make specific proposals for calculation. AT&T lists several possibilities for PSK systems but prefers considering the necessary bandwidth as that bandwidth between the first nulls on either side of the carrier frequency, provided that the signal power density outside of this range is controlled to a specified limit. For FSK systems AT&T believes the currently applicable formula for analog systems (as specified in Rule Section 2.202) would be appropriate. Nippon recommends the following formula for PSK systems:

$$Bn = 2 \times \frac{Sp}{\log_2 m} \times K$$

where: $Bn$ = necessary bandwidth
$Sp$ = total bit rate
$m$ = no. phases
$K$ = constant (varies with equipment but is generally 0.75)

For FSK systems it recommends:

$$Bn = 2 \times \frac{Sp}{\log_2 m} \times (K + D)$$

where: $K$ = constant (dependent on filter—about 0.5)
$D$ = deviation ratio (determined from the value of the S/N required to obtain the arbitrary bit error rate and bandwidth—generally 0.4–0.5)

Datran suggests a similar formula for PSK but its FSK formula is somewhat different (from Nippon's):

$$Bn=\frac{R}{\log_2 n}+(n-1)\Delta f$$

where: $R$=data rate
$n$=no. phases
$\Delta f$=frequency separation of levels

12. With regard to the likely development of digital transmission techniques, we asked questions (k, l and m) relating to the types of techniques that are likely to be used and the growth of applications over the next 5 to 20 years, the likely impact of technology, and the claim of better reliability for digital systems. It is generally conceded that during the past 15 years much of the digital data transmission needs have been primarily accommodated by conversion to an analog mode, though the situation is changing. As digital systems become more economical and the growth of data services increase digital systems will be built to provide for both data and voice communications. There is general agreement that there will be a sharp upturn in digital communications requirements. AT&T states it has investigated ways to improve transmission of digital data over existing microwave systems dedicated primarily to voice communications. It has devised a method of transmitting digital data over analog microwave facilities by employing the lower part of the modulating baseband which they call "Data Under Voice." [2] AT&T has also developed digital equipment with a 20 Mb/s channel capacity which is designed to handle three 6.3 Mb/s bit streams which it anticipates will be put into service by about 1977 for carrying digital data. It estimates that as far as the next 10 years is concerned digital transmission requirements will greatly increase and will be accommodated by high capacity coaxial cable, waveguide and new digital systems operating in frequency bands above 15 GHz. It believes that significant use of these higher band frequencies will be necessitated by lack of available frequencies in the increasingly congested 4, 6 and 11 GHz common carrier bands. However, AT&T indicates that spectrum utilization could be improved by an exploratory program in single sideband AM microwave which could, if successful, yield more than double the capacity of FDM–FM systems and be compatible with these systems under the present interference criteria.

13. Datran envisions a vast need for digital transmission techniques to provide for the communications requirements of the many segments of our ecenomy including securities, insurance, and retailing industries. In the area of insurance, it envisions that digital data transmission will develop from transaction data collections, automated premium payments, inquiries to a centralized medical data base on insurance applicants and will also satisfy the need to transmit premium and claim transaction data between various field and home offices. In the retailing industry it foresees data transmission as a mean of controlling distribution of merchandise from warehouses to stores, controlling

[2] Such a system has been authorized by Commission between Chicago, Illinois, and New York, New York.

inventory levels, and implementing on-line sales and credit systems. In the securities industry it believes that significant data transmission capacity will be required to meet immense volume and the need for more rapid completion of transactions.

14. Most comments indicate that significant future technical innovations and refinements may be anticipated, but they are very limited on specifics. In Western Union's view the most likely method of modulation to be heavily employed in the future will be PSK modulation because of its high theoretical efficiency. Few others venture any definite predictions on which digital technology, if any, is likely to become predominant, but the most interest appears to be currently centered on PSK. Canadian Marconi indicates that much experimental and developmental work is underway, but that most of this work is proprietary and therefore inaccessible. However, it does express the belief that advancing component technology will lower the cost and improve the performance and reliability of digital microwave, that new encoding methods will be more resistant to interfering signals, and that new methods of suppressing sideband radiation will allow closer spacing of microwave systems.

DISCUSSION

## The Frequency Bands Below 15 GHz

15. The comments filed in this proceeding can be classified into two groups in regard to the approach to be taken in introducing digital modulation techniques in the same atmosphere with analog systems. One group suggests the institution of a developmental program to explore any problem areas related to digital techniques and to develop rules later. The second group, which comprises the majority, recommends that digital systems be allowed to share the same bands with current microwave systems subject to some technical restraints to reduce the potential of interference. Advocates of the developmental approach conclude that there may not be satisfactory co-existence of digital and analog systems in the frequency bands below 15 GHz. As previously noted this premise is based largely on the alleged interference potential to which the analog systems would be subjected and the great amount of bandwidth required to carry voice channels via a digital system.

16. We are not persuaded by the arguments advanced by the "developmental advocates" that digital equipment should be excluded from regular authorization in the lower frequency bands. While we do acknowledge an increased interference potential and less efficient voice transmission capability, we are of the opinion that these liabilities can be controlled. Therefore, we generally propose to authorize the use of digital equipment in the lower bands subject to restrictions necessary to protect the operation of analog systems in those bands.[3]

17. Present day operations indicate that when employing digital modulation techniques there is a more even distribution of radiated

[3] Certain microwave systems employ digital and frequency division multiplex techniques to simultaneously modulate a radio frequency carrier. We propose to consider such operations digital, and thus subject to the technical requirements for digital modulation techniques, if they operate in accordance with the criteria in Section 21.120(f), as shown in Appendix B.

energy within the authorized bandwidth than when using frequency division multiplex (FDM) techniques. Therefore, the potential for increased levels of emissions outside of the authorized bandwidth appears to be greater for digital as compared with an FDM signal. Although there is some disagreement as to the specific amount such emissions should be attenuated, there is general agreement that attenuation is required. Some respondents indicated that the level of out-of-band emissions should be referenced to the maximum level of emissions appearing within the authorized bandwidth. However, we do not consider this to be practical, considering the dependence of such in-band emissions upon the modulated signal. Therefore, we are proposing that the reference for the required attenuation of out-of-band emissions be the mean output power of the emission, as is presently the practice in other radio services and with other forms of modulation. Therefore, we are proposing the specific limitations shown in Appendix B, Section 21.106 Emission limitations. We believe that the cost to achieve this attenuation will be minimal over that necessary to provide the attenuation presently specified in our Rules. However, we invite specific comments with regard to this requirement. Note that this requirement differs for the frequency bands above and below 15 GHz.

18. Some comments suggest that it is desirable to use scrambling techniques (e.g. pseudo-random noise generators) to minimize the occurrence of spectral energy concentrations which exist when transmitting repetitive coding sequences. Although the use of such devices may be desirable, we do not believe, on the basis of present information, that a regulatory requirement for their use is necessary. We believe that the decision as to their use should presently be left to the discretion of the system operator or designer, and that the matter of out-of-band interference potential is adequately addressed in our proposed emission limitation requirements.

19. Currently, all microwave carriers are required to coordinate the proposed frequency usage of contemplated microwave facilities with other carriers or users within the area of intended operation (see Rule Section 21.100(d)). This requirement would, of course, be continued with respect to digital facilities. However, in addition to the information now required to be included in the coordinating process, we further propose that proposals involving the use of digital microwave systems in the bands below 15 GHz include a description of the modulation techniques proposed and, upon request of the parties being coordinated with, a complete description of the spectral characteristics of the equipment proposed.[4] This we hope will facilitate clearing proposals and avoiding impact on analog facilities.

20. In addition to minimizing the potential for intereference to systems employing frequency division multiplex (FDM) modulation techniques, we are concerned with the capability of facilities employing digital modulation techniques to provide for encoding a sufficient number of speech channels, particularly in the lower frequency bands.

[4] In amending Section 21.100(d), we are taking this opportunity to incorporate into the coordination procedures the informal guidelines that are currently being used. Also, coordination would be made applicable to applicants in the Domestic Public Land Mobile Radio Service which share the 2 GHz common carrier band for control and repeater uses.

One of the reputed advantages of digital modulation techniques is the ability to receive with a reduced carrier-to-noise ratio, in comparison to using FDM modulation techniques, thereby allowing the use of the same radio frequency twice on a particular path by employing cross-polarization discrimination. The respondents favoring immediate unrestricted utilization of digital modulation techniques cite this capability as the means by which the systems employing such techniques will be able to carry as many encoded speech channels in a given amount of radio frequency bandwidth as could be carried by FDM techniques. However, this appears to be an oversimplification of the matter. It appears that greater utilization of the spectrum may be obtained by using a modulation technique with a format similar to that of the information to be sent, i.e., digital modulation techniques for information in discrete states, such as data, and FDM techniques for information in analog form, such as speech. As an example, if we consider a system operating within an authorized bandwidth of 20 MHz we should, with proper encoding, be able to carry a 20 megabit per second signal by use of digital modulation techniques. However, if we consider a 1200 voice channel FDM system with a maximum capability of 9.6 kB/s per voice channel, the system capacity will be only 11.52 megabits per second. Conversely, present operational FDM techniques will permit 1800 speech channels to be accommodated within a 30 MHz authorized bandwidth, whereas the same bandwidth will often accommodate only about 960 speech channels encoded for transmission by digital modulation techniques, even when employing polarization diversity. While we understand that newer and more sophisticated equipment being developed will substantially improve the efficiency, spectrumwise, of employing digital modulation techniques to carry encoded speech channels, it is unlikely, in the near future to equal the capacity of the more advanced equipment employing FDM techniques to carry speech channels.[5]

21. On the basis of current technology, we would then expect that all information in discrete state or digital form should be transmitted by digital modulation techniques and all information in continuous or analog form should be transmitted by FDM techniques. However, there are practical reasons why this cannot always be done. The most obvious is that the vast majority of existing transmission facilities normally employ FDM or analog modulation techniques but of necessity will also have to handle some information in discrete state or digital form, at least on the less dense routes, for many years to come. Also, it appears that there are some economic reasons why it may be desirable to employ digital modulation techniques to handle encoded voice channels, especially on short routes.[6] Therefore, we do not pro-

[5] Even if digital equipment could equal the voice carrying capacity of analog equipment for the same amount of radio frequency bandwidth, its use of both polarizations on a frequency would limit the ability of digital systems to be located in closer proximity to other systems, especially FDM systems. This is because the cross polarization discrimination which could otherwise be used to avoid frequency conflicts is not available since both polarizations would be utilized by the digital system. Therefore, all other things being equal, the system that uses a single polarization is preferable.

[6] One example of this is where a microwave system interconnects with a T carrier cable system. Since the T carrier is designed to carry voice in a digitally encoded format, it can be interconnected to microwave facilities employing digital modulation techniques without utilizing additional multiplex equipment.

pose to exclude transmission of speech channels by digital modulation techniques or of information in discrete form by FDM technique. However, we believe it would be appropriate to place some minimum requirement upon the equipment employing digital modulation techniques insofar as its capability to carry encoded speech channels. Therefore, we are proposing to require that all transmitting equipment employing digital modulation techniques and used in the lower frequency bands be capable of operation with a bit rate numerically equal to or greater than the authorized bandwidth and where employed to carry encoded speech channels, have a capability to carry a minimum of 1200 such speech channels for operation in the 4, 6, and 11 GHz common carrier bands and 96 such speech channels for operation in the 2 GHz common carrier bands. These capabilities for carrying encoded speech channels are reduced by one-half under certain specified conditions as indicated in the proposed Section 21.120(e)(3), shown in Appendix B. These minimum capabilities should permit some flexibility in the operation of systems employing digital modulation techniques, while providing reasonable constraints against possible inefficient use of the frequency bands presently experiencing congestion.

22. Since PSK, or some form of PSK, appears to be the preferred digital modulation technique and the one on which most of our considerations have been based, some comments are in order on this technique. We understand that multiplex equipment has been developed for PSK employing 2, 4 and 8 signaling states (phases), with 16-signaling state equipment a future possibility. As the number of signaling states are increased, the system capacity is increased (or the required bandwidth decreased) but an increase in transmitter power is required. The increase in transmitter power increases the interference potential of a system. For example, Datran states that a 16-state PSK system (compared at an error rate of $10^{-8}$) requires a signal which has a power level such that it presents a potential source of interference which is 8.2 dB greater than a signal from a system employing 2 signaling states. Also, a PSK system employing a greater number of signaling states (i.e. 8 or 16) requires greater carrier-to-noise ratios for equal error rates, and therefore may not be able to successfully utilize quadrature polarization of antennas to permit the use of a single radio frequency channel to obtain two separate transmission paths. When comparing 2 and 4 signaling state systems, it is generally conceded that there is no difference in the amount of power required for the same total signaling rate, if the bandwidth of the 4-state system is reduced by one-half. It appears from this that the use of a 4-state system would be desirable for efficient use of the frequency spectrum. However, we are not presently proposing to place any such limitation upon the technical requirements for equipment, but instead we are proposing that the signaling rate in bits per second be numerically equal to or exceed the authorized bandwidth in Hz for equipment operating below 15 GHz. Inasmuch as the use of digital modulation techniques with microwave systems is relatively new, we intend to follow closely the nature of its development and use. At a later date, we may find that additional technical parameters (e.g. requirements for certain numbers of signaling states, and requirements for regenerative repeaters) should be specified. However, at this time,

we believe the minimal requirements set forth in this proceeding will provide controls adequate to permit effective administration of our spectrum management responsibilities without unduly restricting the development of the technology.

### The Frequency Bands 15 GHz and Above

23. It is the consensus of the comments that digital modulation techniques can be applied in these higher bands without the problems anticipated in the lower bands. In fact some of the comments suggest that only digital methods be allowed in the bands above 15 GHz in light of the scarce use currently being made of these frequencies and the relatively few problems that would be encountered. Even though the transmission techniques to be employed in these bands appear most likely to be virtually all digital, we do not believe that it is necessary to confine the use of this region of the spectrum to digital techniques. To impose such a restriction, we believe, would be shortsighted since no one is sure what innovations the future will bring. Nor would such restriction appear necessary or advisable from a technical standpoint since digital transmissions are considered to be less sensitive to interference from analog systems. Although we are not proposing restrictions on the type of modulation that can be employed, it shall be incumbent upon users proposing modulation techniques other than digital, to design their systems to reasonably tolerate a digital environment.

24. Initially, we propose a minimum of technical constraints for equipment employing digital modulation techniques and operating in these higher frequency bands. The main consideration at this time will be for minimizing emissions outside of the authorized bandwidth. Therefore, we are proposing certain minimum attenuation requirements for such emissions. Our proposal is set forth in Appendix B, Section 21.106 Emission limitations. While we expect the higher bands to be used in an efficient manner, we are not presently faced with the difficulties in frequency assignment which prevail in the lower frequency bands. With this in mind, we believe that the innovative use of these bands to provide better and more economical communications will be encouraged by specifying a minimum of technical constraints. Specifically, we are not presently proposing to apply any minimum speech channel encoding requirements to equipment operating in the bands above 15 GHz.

### Calculation of Bandwidth

25. We are proposing to modify the existing tables for calculating necessary bandwidth shown in Section 2.202 of our Rules. The formulas shown in Appendix B would apply to amplitude, frequency or phase modulated emissions which obtain when employing digital modulation techniques.

26. The formulas proposed for amplitude modulated emissions have been developed from those specified for other types of keyed emissions. However, we recognize that the value for K, shown as six (6) may require modification for amplitude modulated emissions, depend-

ing upon certain transmission considerations, or that R specified as the signaling speed in bits per second, for frequency modulated emissions, may have to be adjusted to account for additional required signaling frequency components appearing beyond the fundamental frequency corresponding to the signaling rate. For phase shift keying, we are proposing a formula specified in some of the comments received. Our proposal for frequency shift keying is a modification of the present 2M+2DK formula for calculation of necessary bandwidth in FDM systems. Here, we have specified a value of unity for K. The specified method of considering the maximum modulation frequency in FDM systems as the fundamental frequency of the signaling rate, R, may require modification, and should be commented upon. The peak frequency deviation will normally be considered as being the deviation produced by the digital modulation plus the peak deviation produced by any FDM signals.

27. We recognize that the occupied bandwidth of a digitally modulated signal may be greater than the necessary bandwidth of an FDM–FM signal of the same capacity and, therefore, may be of greater significance in determining the authorized bandwidth. However, we are not convinced that there is good reason for departing from the existing definition of occupied bandwidth contained in Section 2.202(a) of the rules. But we do raise the question of whether the resulting authorized bandwidth will permit the full utilization of adjacent channels (under existing frequency plans) by analog and digital equipment.

CONCLUSION

28. Appendix B hereto contains the details of the rules proposed. Applications proposing the use of digital techniques may be filed. If they are consistent with the proposed rules, they may be granted, but any authorizations issued will be made subject to the finalization of the rules in this proceeding. Applications not consistent with the proposed rules will not be granted but will be retained on file pending the finalization of this proceeding.

29. Authority for this proposed rule making is contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended. All interested persons are invited to file written comments on these proposed rules on or before July 2, 1973 and reply comments on or before August 3, 1973. In reaching its decision in this matter, the Commission may take into account any other relevant information before it in addition to the comments invited by this Notice.

30. In accordance with the provisions of Section 1.419 of the Commission's rules, an original and 14 copies of all comments, replies, pleadings, briefs or other documents shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

## APPENDIX A

COMMENTS FILED IN DOCKET NO. 19311

Aerospace & Flight Test Radio Coordinating Council
American Telephone & Telegraph Co.
Association of American Railroads
Avantek, Inc.
Canadian Marconi Co.
Central Committee on Communication Facilities of the American Petroleum Institute
City of Anchorage Telephone Utility and Matanuska Telephone Association, Inc. (Joint)
Collins Radio Co.
Columbia Broadcasting System, Inc.
Communications Satellite Corp.
Cubic Corp.
Culberton Industries, Inc.
Data Transmission Co.
Electronic Industries Association (Pt/Pt Communications Section)
Farinon Electric
GTE Lenkurt
GTE Service Corp.
International Microwave Corp.
Laser Link Corp.
Martin Marietta Corp.
MCI Carriers
Microwave Associates, Inc. & Vicom (Joint)
National Association of Manufacturers
Nippon Electric Co., NEC America, Inc.
Raytheon Co.
Secretary of Defense
Somerset Telephone Co.
United States Independent Telephone Association
Utilities Telecommunications Council*
Western Union Telegraph Co.

REPLY COMMENTS

Aerospace & Flight Test Radio Coordinating Council
American Telephone & Telegraph Co.
Avantek, Inc.
City of Anchorage Telephone Utility and Matanuska Telephone Association (Joint)
Communications Satellite Corp.
Data Transmission Co.
Electronic Industries Association (Satellite Telecommunications Section)
MCI Carriers
National Association of Business and Educational Radio, Inc.
National Association of Manufacturers
Somerset Telephone Co.

## APPENDIX B

It is proposed to amend Parts 2 and 21 of Chapter I of Title 47 of the Code of Federal Regulations as follows:

1. In § 2.1 add the following definition in appropriate alphabetical order:

§ 2.1 *Definitions.*

* * * * * * *

Digital modulation. The process by which some characteristics (frequency, phase or amplitude) of a carrier is varied in accordance with a signal composed of coded pulses or states derived from quantized information.

* * * * * * *

*Also considered in this proceeding were UTC's comments filed in Docket No. 18878.

2. In § 2.202 modify paragraphs (e) and (g) as indicated:

* * * * * * *

(e) In the formulation of the table in paragraph (g) of this section, the following terms are employed:

* * * * * * *

R=Maximum signaling speed in binary digits (bits) per second.
S=Number of signaling states.

* * * * * * *

(g) Table of necessary bandwidths:

I. AMPLITUDE MODULATION

| Description and class of emission | Necessary bandwidth in hertz | Examples | |
|---|---|---|---|
| | | Details | Designation of emission |
| * | * | * | * |
| Composite transmission: A9 (Digital modulation with PCM encoding). | $B_n=RK$ $K=6$ | Microwave radio relay specifications: digital modulation used to send 5 megabit signaling rate by use of amplitude modulation of the main carrier. Computation of $B_n$: $R=5\times10^6$ bits per second, $K=6$. $B_n=5\times10^6\times6$. Bandwidth=30,000 Hz. | 30,000A9G |

II. FREQUENCY MODULATION

| Description and class of emission | Necessary bandwidth in hertz | Examples | |
|---|---|---|---|
| | | Details | Designation of emission |
| * | * | * | * |
| Composite transmission: F9 (Digital modulation with PCM encoding) | $B_n=\frac{2RK}{\log_2 S}$ $K=1$ | Microwave radio relay system specifications: digital modulation used to send a 10 megabit signaling rate by use of phase shift keying with 4 signaling states. Computation of $B_n$: $R=10^7$ bits per second; $S=4$. Bandwidth: $10^7$ Hz. | 10,000F9G |
| Composite transmission: F9 (Digital modulation with PCM encoding) | $B_n=2R$ $+2DK$ $K=1$ | Microwave radio relay system specifications: digital modulation used to send 10 megabit signaling rate by use of frequency shift keying with a 2 MHz peak deviation of the main carrier. Computation of $B_n$: $D=2$ MHz; $R=10^7$ bits per second. $B_n=2\times10^7+4\times10^6$ Bandwidth=$24\times10^6$ Hz. | 24,000F9G |

III. PULSE MODULATION

* * * * * * *

3. Add the following to Section 2.577(b)(3):

*Section 2.577 General information required for type acceptance.*

* * * * * * *

(b)(3) * * *

For equipment employing digital modulation techniques, a detailed description of the multiplex system to be used, including the response characteristics (frequency, phase and amplitude) of any filters provided, and a description of the modulating wave-train, shall be submitted.

* * * * * * *

4. In Section 2.579, change the designation for subparagraph (c)(8) to (c)(9), and add a new subparagraph (c)(8) to read as follows:

*Section 2.579 Measurement data required for type acceptance.*

* * * * * * *

(c)(8) Transmitters employing digital modulation techniques—when modulated by an input signal such that its amplitude and switching rate represent the maximum rated conditions under which the equipment will be operated. The signal shall be applied through any filter networks, pseudo-random generators or other devices used in normal service. In addition, the occupied bandwidth shall be shown for operation both with and without any filtering which may be needed for purposes of shaping the spectrum of the radio frequency emissions.

* * * * * * *

5. In Section 21.1 add the following definition in appropriate alphabetical order:

*Section 21.2 Definitions.*

* * * * * * *

Digital modulation. The process by which some characteristic (frequency, phase or amplitude) of a carrier is varied in accordance with a signal composed of coded pulses or states derived from quantized information.

* * * * * * *

6. Amend Section 21.100(d) to read as follows:

*Section 21.100 Frequencies.*

* * * * * * *

(d) All applicants for regular authorization in the Point-to-Point Microwave Radio and Local Television Transmission Services and in the Domestic Public Land Mobile Radio Service for use of the bands 2110–2130 MHz and 2160–2180 MHz shall, before filing an application or major amendment to a pending application, coordinate proposed frequency usage with existing users in the area and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference or restricted ultimate system capacity. In coordinating frequency usage with stations in the fixed-satellite service, applicants shall also comply with the requirements of Section 21.706 (c) and (d). All applicants, permittees and licensees shall cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum. Applicants should make every reasonable effort to avoid blocking the growth of systems that are likely to need additional capacity in the foreseeable future. The applicant shall identify in the application all entities with which the technical proposal was coordinated. In the event that technical problems are not resolved or if the existing licensee, permittee or applicant does not respond to coordination efforts within 30 days after notification, an explanation shall be submitted with the application. Where technical problems are resolved by an agreement or operating arrangement between the parties that would require special procedures be taken to reduce the likelihood of harmful interference (such as the use of artificial site shielding) or would result in lessened quality or capacity of either system, the details thereof shall be contained in the application. The following guidelines are applicable to the coordination procedure:

(1) Coordination involves two separate elements: notification and response. Both or either may be oral or in written form. To be acceptable for filing, all applications and major amendments must certify that coordination, including response, has been completed. The name of the carriers with which coordination was accomplished must be specified.

(2) Notification must include relevant technical details of the proposal. At minimum, this should include, as applicable, the following:

Transmitting station name
Transmitting station coordinates
Frequencies and polarization to be added or changed
Transmitting equipment type, its stability, actual output power, and emission designator
Transmitting antenna type and model and, if required, a typical pattern and maximum gain
Transmitting antenna height above ground level and ground elevation above mean sea level
Receiving station name
Receiving station coordinates
Receiving antenna type and model and, if required, a typical pattern and maximum gain

Receiving antenna height above ground level and ground elevation above mean sea level
Path azimuth and distance

(3) For transmitters employing digital modulation techniques at frequencies below 15 GHz, the notification should clearly identify the type of modulation. Upon request, details of the operating characteristics of any equipment employing digital modulation techniques shall also be furnished.

(4) Response to notification should be made as quickly as possible, even if no technical problems are anticipated. Every reasonable effort should be made by all carriers to eliminate all problems and conflicts. If no response to notification is received within 30 days, the applicant will be deemed to have made reasonable efforts to coordinate and may file his application without a response.

(5) The 30-day notification period is calculated from the date of receipt by the carrier being notified. If notification is by mail, this date may be ascertained by: (a) the return receipt on certified mail, (b) the enclosure of a card to be dated and returned by the recipient, or (c) a conservative estimate of the time required for the mail to reach its destination. In the latter case, the estimated date when the 30-day period would expire should be stated in the notification.

(6) All technical problems that come to light during coordination must be resolved unless a statement is included with the application to the effect that the applicant is unable or unwilling to resolve the conflict and very briefly the reason therefor.

(7) Where a number of technical changes become necessary for a system during the course of coordination, an attempt should be made to minimize the number of separate notifications for these changes. Where the changes are incorporated into a completely revised notice, the items that were changed from the previous notice should be identified.

(8) Where subsequent changes are not numerous or complex, the carrier receiving the changed notification should make an effort to respond in less than 30 days. Where the notifying carrier believes a shorter response time is reasonable and appropriate, it may be helpful for him to so indicate in the notice and perhaps suggest a response date.

(9) If it is determined that a subsequent change could have no impact on some carriers receiving the original notification, it is not necessary to coordinate the change with such carrier. However, these carriers should be advised of the change and of the opinion that coordination is not required for said change.

(10) Carriers should supply to all other carriers, or known carrier applicants, within their areas of operations, the name, address and telephone number of their coordination representatives. Upon request from coordinating carriers or applicants, data and information concerning existing or proposed facilities and future growth plans in the area of interest should be furnished unless such request is unreasonable or would impose a significant burden in compilation.

(11) Carriers should keep other carriers with which they are coordinating advised of deletions or changes in plans for facilities previously coordinated. If applications have not been filed 6 months after coordination was completed, carriers may assume, unless notified otherwise, that such frequency use is no longer desired.

7. In Section 21.106, modify paragraph (a) as indicated:

*Section 21.106 Emission limitations.*

(a) The mean power of emissions shall be attenuated below the mean output power of the transmitter in accordance with the following schedule:

(1) When using transmissions other than those employing digital modulation techniques:

(i) On any frequency removed from the assigned frequency by more than 50 percent up to and including 100 percent of the authorized bandwidth: At least 25 decibels;

(ii) On any frequency removed from the assigned frequency by more than 100 percent up to and including 250 percent of the authorized bandwidth: At least 35 decibels.

(2) When using transmissions employing digital modulation techniques (See Section 21.120(f):

(i) On any frequency removed from the assigned frequency by more than 50 percent up to and including 100 percent of the authorized bandwidth:

At least 50 decibels for operating frequencies below 15 GHz and 35 decibels for operating frequencies above 15 GHz;

(ii) On any frequency removed from the assigned frequency by more than 100 percent up to and including 250 percent of the authorized bandwidth:

At least 60 decibels for operating frequencies below 15 GHz and 45 decibels for operating frequencies above 15 GHz.

(3) On any frequency removed from the assigned frequency by more than 250 percent of the authorized bandwidth: At least 43 plus 10 $Log_{10}$ (mean output power in watts) decibels, or 80 decibels, whichever is the lesser attenuation.

* * * * * * *

8. In Section 21.120, add new paragraph (e) and (f) to read as follows:

*Section 21.120 Type acceptance of transmitters.*

* * * * * * *

(e) Transmitters employing digital modulation techniques and operating below 15 GHz shall, with appropriate multiplex equipment, comply with the following additional requirements:

(1) The transmission rate, in bits per second, shall be equal to or greater than the authorized bandwidth in hertz, e.g., to be acceptable for use in a frequency band permitting an authorized bandwidth of 20 MHz, the equipment must be shown to be capable of operating at a transmission rate of at least 20 megabits per second.

(2) To be considered acceptable for use with 4 kHz message channels encoded as digital modulation, shall be capable of satisfactory operation within the authorized bandwith when operating at a bit rate sufficient to encode at least the following number of such speech channels:

| Frequency Range: | *Number of encoded ¼ kHz channels* |
|---|---|
| 2110–2130 MHz | 96 |
| 2160–2180 MHz | 96 |
| 3700–4200 MHz | 1200 |
| 5925–6425 MHz | 1200 |
| 10,700–11,700 MHz | 1200 |

(3) The required minimum number of channels shown in subparagraph (e)(2) of this section may be reduced by one-half, provided that simultaneous operation of two such transmitters at the same location, on identical radio frequencies, does not cause the error rate received from either transmitter to exceed twice the error rate received from a single transmitter operated independently. The error rate, after the permitted degradation, shall be such that acceptable operational capability will be maintained.

(f) For purposes of compliance with the emission limitation requirements of Section 21.106(a)(2) of this part and the requirements of paragraph (e) of this section, digital modulation techniques are considered as being employed when digital modulation contributes 50 percent or more to the total peak frequency deviation of a transmitted radio frequency carrier. The total peak frequency deviation shall be determined by adding the deviation produced by the digital modulation signal and the deviation produced by any frequency division multiplex (FDM) modulation used. The deviation (D) produced by the FDM signal shall be determined in accordance with Section 2.202(f) of Part 2 of this Chapter.

F.C.C. 73R-175

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Applications of<br>GUY S. ERWAY, WEST PALM BEACH, FLA.<br>SANDPIPER BROADCASTING CO., INC., WEST PALM BEACH, FLA.<br>SUN SAND AND SEA, INC., WEST PALM BEACH, FLA.<br>MARSHALL W. ROWLAND, WEST PALM BEACH, FLA.<br>For Construction Permits | Docket No. 19601<br>File No. BPH-7137<br>Docket No. 19602<br>File No. BPH-7533<br>Docket No. 19603<br>File No. BPH-7809<br>Docket No. 19604<br>File No. BPH-7843 |

MEMORANDUM OPINION AND ORDER

(Adopted April 30, 1973; Released May 3, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Before the Review Board is a further motion to enlarge issues, filed January 26, 1973, by Guy S. Erway, requesting the addition of the following issue against Sandpiper Broadcasting Co., Inc., (Sandpiper):

> To determine whether Sandpiper Broadcasting Co., Inc., misrepresented facts to the Commission in this proceeding respecting their legal qualifications, and particularly whether they misrepresented to the Commission the true composition of Sandpiper Broadcasting Corporation and/or Sandpiper Broadcasting Co., Inc. when the application was originally filed and/or amended.[1]

2. Petitioner's request for a misrepresentation issue stems from Sandpiper's opposition to Erway's earlier motion to enlarge issues of November 10, 1972, requesting, *inter alia*, a legal qualifications issue against Sandpiper.[2] In response to Erway's challenge to its legal qualifications, Sandpiper claimed that it had always had four directors; that due to an inadvertent error, Section II of the application did not include William M. Hart as a director and as a Florida resident; and that Hart was not named in the application because the stockholders did not realize that Section II required disclosure of directors who were not also stockholders. Erway contends that these statements are "deliberate falsehoods" and that Sandpiper did not intend on May 17, 1971, the filing date of its application, to have Hart as a director. In support, Erway asserts that Sandpiper intended on May 17, 1972 to incorporate in Florida using the same name (Sandpiper Broadcasting Corporation) as they were going to use in connection with their acquisition of a New York FM Station (WWRJ). According to peti-

[1] Also before the Board are the following related pleadings: (a) Broadcast Bureau's comments, filed February 8, 1973; (b) opposition, filed February 8, 1973, by Sandpiper; and (c) reply, filed February 16, 1973, by Erway.

[2] The request for a legal qualifications issue is being denied in a Memorandum Opinion and Order being adopted this same date.

tioner, since Hart was not a director of the proposed New York corporation, it is clear that Sandpiper did not intend to have Hart as a director of the Florida corporation. Erway contends that if Sandpiper intended originally to have Hart as a director, it would have filed under the applicant name of Sandpiper Broadcasting Co., Inc.

3. In opposition, Sandpiper asserts that Erway's claims are unsubstantiated and based on sheer speculation. Furthermore, the applicant explains that the failure to include Hart's name in the application was an inadvertent error since it was unaware that Section II required disclosure of directors who did not hold stock interest. Sandpiper asserts that it has always been legally qualified to file and prosecute its application and notes that its Articles of Incorporation, dated May 26, 1971, included Mr. Hart's name in the list of directors. Finally, Sandpiper contends that it would have no motive for failing to disclose Hart's directorship and therefore the issues should not be enlarged to include a misrepresentation issue. The Bureau urges that petitioner's contentions are founded on unproven speculation and that Erway has submitted no facts in support of its assertion that Sandpiper did not intend to have Hart as a director of the Florida corporation on May 17, 1971.

4. The Review Board is of the view that petitioner's claims are wholly inadequate to warrant addition of the requested issue. Petitioner's allegations appear to be based solely on speculation and surmise and therefore do not meet the specificity requirements of Section 1.229 of the Rules. The Board fails to perceive any causal relationship between Sandpiper's proposed use of the same corporate name for both its New York and Florida stations and the question of Mr. Hart's directorship of the Florida corporation. Moreover, we believe that Sandpiper's explanation for its failure to include Hart's name in the application is adequate to dispel any question of misrepresentation, especially in view of the fact that the applicant's Articles of Incorporation, dated May 26, 1971, just nine days after its application was filed, included Hart's name in the list of directors. Therefore, Erway's request for a misrepresentation issue will be denied.

5. Accordingly, IT IS ORDERED, That the further motion to enlarge issues, filed January 26, 1973, by Guy S. Erway, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

40 F.C.C. 2d

109-039—73——5

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In Re Complaint by
ACCURACY IN MEDIA, INC.
Concerning Fairness Doctrine Re NBC

MAY 2, 1973.

NATIONAL BROADCASTING CO., INC.,
*RCA Building,*
*30 Rockefeller Plaza,*
*New York, N.Y. 10020*

GENTLEMEN: This is with reference to the complaint to the Commission of Accuracy in Media, Inc. (AIM) concerning the program "Pensions: The Broken Promise" which was broadcast by the NBC television network on September 12, 1972.

By letter of complaint to the Commission dated November 27, 1972, AIM states that the program in question presented a "distorted picture of the private pension system of the United States" in that "Nearly the entire program was devoted to criticism of private pension plans, giving the impression that failure and fraud are the rule in the management of private pension funds"; that "only two brief statements toward the end of the program" presented "anything on the positive side"; and that although the narrator, Mr. Edwin Newman, "said that NBC did not want to give the impression that there are no good private pension plans . . . he did not discuss any good plans or show any satisfied pensioners" and "summed up the program by saying: 'The situation, as we've seen it, is deplorable.' " AIM further states that "Department of Labor records show that thousands of retirement plans are consistently paying benefits to retired people and that 75 per cent of them are funded entirely by employers: that "more than 30 million workers are covered by these plans" and "more than 5 million retired employees are receiving benefits from them to the tune of about $7 billion a year"; that "the incidence of termination of pension plans is about 1 per cent" affecting "only about one-tenth of one per cent of the employees covered by private pension plans"; and that such statistics indicate that "the NBC program was not only one-sided but inaccurate." AIM submits that "Criticism of pension plans affecting millions of Americans is obviously a controversial issue of public importance" and that "NBC violated the fairness doctrine in presenting what was essentially a one-sided and distorted discussion of this issue." AIM also states that its "monitoring of NBC programs has not revealed any program which has been presented by NBC stations which discusses the operation of successful pension programs," and that it communicated these particulars of its complaint to the President of NBC, Mr. Julian Goodman, by letter dated November 6, 1972, but had received no response.

AIM has also submitted a copy of a letter, dated December 6, 1972, which it sent to Mr. Goodman reiterating its complaint with respect to the Pensions program. That letter also directed attention to current Congressional study of proposals to regulate private pension funds and noted that "this legislation is opposed by some labor unions and by the Chamber of Commerce and the National Association of Manufacturers." It further stated that "While your program did not endorse any specific legislative proposal, it did emphasize the need for new regulatory legislation and it pointed out that the Senate Labor Committee had the matter under consideration." The letter also stated that Senator Schweiker, one of the proponents of the legislation reported out of the Committee, had the script of the program read into the Congressional Record of October 3, 1972 as indicating "the need for pension reform and the serious breakdown in our private pension systems." AIM concluded its letter by stating that this information "demonstrates that this was indeed a program about a controversial issue of public importance which was not fair and balanced."

In your response of February 14, 1973 to the Commission's inquiry, you state that "Complainant's general and conclusory accusations of inaccuracy and unfairness are incorrect," and "Being so, they are of course denied." You submit that the complaint "is not one of unfairness of the program in terms of the program's subject matter, but that a program which focused on the problems of some private pension plans should, instead, have focused on how successful private pension plans have worked"; that the program "constituted a broad overview of some of the problems involved in some private pension plans" and "did not attempt to discuss all private pension plans, nor . . . urge the adoption of any specific legislative or other remedies"; and that the program "was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look." In this regard, you note that the decision concerning the subject of a given program "is a judgment which the Commission and the Congress have entrusted to the licensee," and that rulings of the Commission hold that its " '. . . function is not to judge the merit, wisdom or accuracy' " of particular programming. You also state that the AIM complaint "implies that because of the existence of 'good plans' and 'satisfied pensioners,' a program designed to explore the problems that exist in pension plans fails as a matter of 'truth,' " and submit that although the program "was not in essence 'untrue' or misleading," Commission authority holds that such questions of truth or accuracy are not proper subjects for its review. You further state that complainant "has made no effort to actually establish that anything within the program itself was inaccurate," and that AIM has established only that "it has a different editorial view than that which it attempts to attribute to this program."

You also submit that with respect to the applicability of the fairness doctrine to the program, "The questions of what issue has been the basic subject matter of a program and whether it is a controversial one are matters on which broadcasters' judgments must be upheld unless clearly unreasonable or in bad faith." In this regard, you state that "the fact that problems exist with some private pension plans" is not a "controversial issue of public importance within the meaning of the

Commission's fairness doctrine" and that your judgment that the "presentation of some problems incident to some private pension systems did not at that time present an issue of significant public controversy was reasonable." You state in support of this judgment, that to your knowledge, neither NBC nor the other networks had telecast any program dealing extensively with private pensions in the years prior to the broadcast of "Pensions"; that there was "little discussion in any general circulation print media and no widely circulated books on the subject" and "no apparent public discussion, much less controversy, apart from that of a relatively small number of experts, businessmen and government officials who take a professional interest in the subject"; and that although "there had been hearings in the last Congress on the subject, . . . at the time of broadcast NBC was breaking new ground journalistically on a subject about which the public, at that time, had little knowledge."

You further submit that AIM's complaint is deficient in that complainant "has not tried to define any controversial issue of public importance involved in this program nor has it attempted to demonstrate that there is any significant body of public opinion that disputes the point of the program," and has also failed to identify any "unfairness or imbalance" in the material presented. You therefore urge that the "complaint should be dismissed."

You also state that "regardless of the apparent lack of any discernible public points of view on the subject one way or another," you "believed that the subject of 'Pensions' was newsworthy because of the broad public impact of private pension systems," and that you "attempted to treat the subject in an evenhanded, accurate and reasonable manner." In support of this statement, you submit and draw attention to a script of the program and several of the views which were presented.

You conclude your response by noting that you "expect to treat from time to time, in future programming, various aspects of pension plans to the extent that the subject remains newsworthy"; that "The subject does appear to us to be of more than momentary importance"; and that "Should NBC return to the matter of private pensions in the future, it will continue to attempt to explore the significant contrasting points of view within the context of the specific subject matter presented."

By letter of reply to your response, dated February 20, 1973, AIM disputes your statement that there is no body of opinion which questions the point of the program, again citing the statistics regarding successful versus failing pension plans referred to in its letters of complaint. Referring to your statement that the program only presented a "broad overview of some of the problems involved in some private pension plans" and "did not attempt to discuss all private pension plans", AIM states that "No one denies that a fraction of the private pension plans have failed," but "What was wrong with the NBC program on pensions was that it created the impression that failure, was, if not the rule, very common." In reply to your contention that it has failed to specify the controversial issue of public importance involved in the program, AIM states that "the performance of private pension plans is clearly an issue of public importance about which there is considerable controversy"; that "The Retirement Income Security for

Employees Act of 1972 is a controversial bill" opposed by various groups and individuals; that support for this legislation "may depend on how the legislators and the public evaluate the performance of private pension plans now in operation"; and that "While NBC did not endorse the proposed legislation" in the Pensions program, "it presented a one-sided documentary that created the impression that injustice and inequity were widespread in the administration of private pension plans." AIM also states that "it seems likely that it [NBC] had some help from the sponsors of the legislation in the preparation of its program" and that "The supporters of the Retirement Income Security Employees Act of 1972 assumed . . . that this program would create an emotional reaction that would strengthen support for their legislative proposals." AIM further states that the program contained "no presentation of a contrasting point of view," and that "NBC cannot escape its responsibility by tossing into the program a face-saving statement to the effect that—oh, yes, by the way, there are some good pension programs." In closing, AIM states:

> We do not maintain that the program should have focused only on successful pension plans or only on unsuccessful pension plans. We insist only on a fair and balanced presentation. The ineluctable fact remains that this program focused only on unsuccessful pension plans.

The initial question raised by these pleadings is whether AIM has submitted sufficient allegations and supporting information to set forth a cognizable complaint under the fairness doctrine. The fairness doctrine obligates a broadcaster presenting one side of a controversial issue of public importance to afford reasonable opportunity in his overall programming for the presentation of contrasting views. Where a fairness complaint is made to the Commission, the complainant is required to submit certain particulars indicating a *prima facie* case of violation including: (1) the specific issue of a controversial nature of public importance broadcast; (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the particular station's local area at the time of the broadcast; and (3) reasonable grounds for the claim that the station or network involved has broadcast only one side of the issue in its overall programming and has failed to afford reasonable opportunity for the presentation of contrasting viewpoints. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964); *Allen C. Phelps*, 21 F.C.C. 2d 12 (1969). In this regard, the courts have recognized that "On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee or network devoted to this particular issue." *Healey* v. *F.C.C.*, 460 F. 2d 917, 921 (D. C. Cir., 1972); see also *Hale* v. *F.C.C.*, 425 F. 2d 556, 558 (D. C. Cir., 1970).

With respect to the sufficiency of fairness doctrine complaints, the Commission has consistently distinguished between claims of unfairness properly within the purview of the doctrine and allegations which challenge only the "truth" or accuracy of broadcast material or contend that a licensee or network has deliberately slanted or distorted its news coverage or other public affairs programming. Thus, with reference to

complaints disputing the "truth" or accuracy of program material, it has stated:

> The Commission has never examined news coverage as a censor might to determine whether it is fair in the sense of presenting the "truth" of an event as the Commission might see it . . .
>
> It is important that the public understand that the fairness doctrine is not concerned with fairness in this sense. This is not because such actual fairness is not important, but rather because its determination by a government agency is inconsistent with our concept of a free press. The Government would then be determining what is the "truth" in each news situation—what actually occurred and whether the licensee deviated too substantially from that "truth." We do not sit as a review body of the "truth" concerning news events . . .
>
> Rather, we shall consider the overall question of whether reasonable opportunity for contrasting viewpoints was afforded with respect to . . . controversial issues referred to in the complaints we have received. *Letter to ABC, et al.*, 16 F.C.C. 2d, 650, 655–56 (1969).

For similar policy reasons, the Commission has held that with respect to allegations of deliberate distortion, slanting or rigging.

> . . . the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency. *Letter to ABC, supra*, at 657–58; see also *Hunger in America*, 20 F.C.C. 2d 143, 149–151 (1969).

Turning to the allegations contained in AIM's letters of complaint to you and to the Commission and in its reply to your response, we note that AIM alleges the omission of various facts and statistics concerning the operation of private pension plans as evidence that the Pensions program was "distorted" and "inaccurate" and also charges that such material was "concealed, omitted, or suppressed in order to produce a program that constituted an all-out assault on the private pension system in the United States." These allegations merely dispute the truth and accuracy of the material presented in the program and thereby purport to establish a case of deliberate distortion and slanting without submission of extrinsic evidence in support thereof. The above-noted decisions of the Commission preclude review or investigation of AIM's allegations of distortion and inaccuracy within the program itself, and they therefore receive no further consideration here.

However, aside from charges of inaccuracy and distortion, complainant's pleadings set forth sufficient allegations to constitute a cognizable complaint under the fairness doctrine. AIM states that in light of pending Congressional consideration of legislative proposals to regulate private pension plans, the "performance" of such plans "is clearly an issue of public importance about which there is considerable controversy." Here it cites opposition to such regulatory proposals "by many labor union officials, by the Chamber of Commerce, the National Association of Manufacturers and the Nixon Administration" as evidence of their controversiality and public importance, and submits that support for the proposals "may depend on how the legislators and the public evaluate the performance of private pension plans now in operation." Complainant further alleges that the entire Pensions pro-

gram "was devoted to criticism of private pension plans" and "presented a one-sided documentary that created the impression that injustice and inequity were widespread in the administration of private pension plans," and states that the program emphasized "the need for new regulatory legislation." Finally, complainant alleges that "only two brief statements toward the end of the program" presented anything on the other side and cites your refusal to acknowledge the applicability of the fairness doctrine to the program and its monitoring of subsequent NBC programming as indicating that you have failed to afford reasonable opportunity for the presentation of contrasting views. These particular allegations satisfy the Commission's procedural requirements as set forth in *Phelps*, *supra*, and judicially recognized and interpreted in *Healey* and *Hale*, *supra*, and hence constitute a complaint properly reviewable under the fairness doctrine.

Given the sufficiency of AIM's complaint, the controlling issue presented is the reasonableness of your judgment that the program did not present one side of a controversial issue of public importance within the meaning of the fairness doctrine. As the Commission has stated in its Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," 40 F.C.C. 598 (1964):

> . . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming . . . In passing on any complaint in this area, the Commission's role is not to substiute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. 40 F.C.C. at 599.

In response to the fairness allegations advanced in AIM's complaint, you submit that:

> The program constituted a broad overview of some of the problems involved in some private pension plans. It did not attempt to discuss all private pension plans, nor did it urge the adoption of any specific legislative or other remedies. Rather, it was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look.

In support of the reasonableness of this judgment, you cite the following concluding remarks of Edwin Newman, the Pensions narrator, as "placing the subject matter of the program in focus:"

> This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.
>
> There are certain technical questions that we've dealt with only glancingly . . . These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.
>
> Our own conclusion about all this is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.
>
> The siutation, as we've seen it, is deplorable.

Review of the script of the entire Pensions program clearly indicates that the program's focus was broader in scope than an "overview of some of the problems involved in some private pension plans." The

program began with the announcement "Tonight NBC reports on Pensions: The Broken Promise," followed by these general statements by unidentified men and women:

WOMAN. There must be thousands maybe millions of them that's getting the same song and dance my husband got. When they reach their time for retirement there is no funds to pay them.

MAN. Where does all this money go that's been paid into these pensions.

MAN. The pension system is essentially a consumer fraud, a shell game and a hoax. As a mater of fact, when you say it's a consumer fraud, you pay it an undue compliment, because typically you think of consumer frauds in terms of short transactions . . . but with the pension system you really have a long term contract that may run fifty or a hundred years that's designed to guarantee the security of our population. Essentially, you have an insurance contract that can't be relied on. You have an insurance contract that can't be trusted.

Mr. Newman then began his narration at the Department of Labor office where the annual pension reports required by law are filed. Referring to such files, Mr. Newman stated:

There are millions of hopes and dreams in these files. If experience is any guide, very many of the hopes will prove to be empty and dreams will be shattered and the rosy promises of happy and secure retirement and a vine covered cottage will prove to be false.

By way of "example" of the complaints received by the Department of Labor concerning the operation of pensions plans, the program presented the statements of several men and women relating their personal experiences with plans which had failed. The program then turned to interviews with various public figures who expressed their views on different aspects of private pension plans. Such views included the following:

HERBERT DENNENBERG. When you get to be sixty-five, you're out of work and you need a source of money and that's what a pension plan is supposed to do. Unfortunately, it's woefully inadequate. Over half the people have nothing at all from pension plans and those that do typically have only a thousand dollars a year so even if you have social security, most pension funds are inadequate.

* * * * * * *

NEWMAN. Many employees form their ideas about pensions by reading the slick brochures that their company or union gives them. Most of these booklets do make a pension seem a sure thing. The many restrictions and exclusions are buried in fine print or concealed by obscure language.

The Senate Labor Committee has been looking at these brochures as part of its general study of the pension problem. Senator Harrison Williams is chairman of the committee.

Senator WILLIAMS. I have all kinds of descriptions of plans here and all of them just suggest the certainty of an assured benefit upon retirement. Here's a man—this was from a brewery, sitting relaxed with a glass of beer and checks coming out of the air; well, you see, this gives a false hope, a sense of false security.

NEWMAN. Senator, the way private pension plans are set up now, are the premises real?

WILLIAMS. The answer is, they are not.

* * * * * * *

DENNENBERG. It's almost an obstacle course and the miracle is when someone actually collects with the plan. There have been studies that indicate that most people won't collect . . .

You have to go to work for an employer, you have to stay with him, you have to stay in good health, you have to avoid layoffs, you have to take your money, turn it over to the employer, hope that he invests it safely and soundly, you have to hope that when you're age sixty-five the employer is still around and he's not likely to be in terms of the high mortality of business, so there's almost a sequence of miracles which you're counting on.

The remainder of the one-hour program followed along similar lines: specific examples of private pension plans which had failed were cited and discussed in interviews with the employees involved and centered on problems of the portability and vesting of pension rights, the adequacy of funding and payments upon retirement, and the fiduciary relationship between employees and those who manage the funds. In addition to such discussion of specific plans which had failed adequately to deal with one or more of the above particulars, the program presented the following general views:

VICTOR GOTBAUM. In the United States we have a magnificent ability to cover up our own diseases especially the disease of big business. Pensions in the private area are a mockery. They're a national disgrace. We know this.

* * * * * * *

EDWARD KRAMER. Going to a movie is a big expense, taking a bus to a clinic to visit a doctor is a big expense, buying a new pair of shoes is a big expense, getting ill and having to get medicine is a big expense. This is where, if there was an adequate pension system in the United States along with social security, some of these problems could be avoided.

* * * * * * *

RALPH NADER. I think time is running out. On the private pension systems. And its abuses continue to pile up, and if its enormous popular disappointments begin to be more and more revealed, it might collapse of its own weight, and social security will have to take up the slack.

* * * * * * *

DENNENBERG. I say it's the employee's money and I think that is the economic fact of life and I think in terms of the morals of the problem and in terms of the economics of the problem, that anyone would conclude that it does belong to the employee and yet it's not being used for his benefit.

In light of these many statements and views, we believe it cannot be reasonably said that the program was confined in scope to only "some problems in some pension plans." Such a characterization would ignore these sharp and direct criticisms of the whole private pension system which pervaded the entire program.

It must also be observed that while the program itself did not "urge the adoption of any specific legislative or other remedies" with respect to the operation of private pension plans, it did note at several points that the Congress was considering such matters and presented the views of various spokesmen who advocate governmental regulation of the private pension system:

HERBERT DENNENBERG. I think we need controls of the same type we apply to insurance companies, your money should be funded so it's going to be there at age sixty-five. Today, it's almost a miracle if it's there at age sixty-five.

* * * * * * *

CHARLES RUFF. We have no real idea of how much fraud there may be in the pension plan area. But you're talking about institutions, the pension plan area, generally, that deals in hundreds of billions of dollars. And when you have that much money involved, the federal government ought to take a more active role than it does.

* * * * * * *

DENNENBERG. We regulate insurance completely. We regulate the agent, the contract, reserve, the policies, the sales technique, the investment, we regulate insurance companies from birth to death. And yet we have a gigantic pension system, almost the size of the insurance industry, a hundred and fifty billion dollar business that's essentially unregulated. Can you imagine what would happen if we would let insurance companies do whatever they wanted to? We can't even protect the public with full regulation in insurance, but essentially

we have a pension system which is precisely an insurance plan and which is almost unregulated.

* * * * * * *

Senator SCHWEIKER. What we're proposing to do a little bit what was done with the bank failure problem. We didn't go in and take over the banks but we did, by means of insurance and federal deposit insurance corporation come in and guarantee that no depositor would lose his savings under a certain point. And I think that's what we're saying here, that once a worker has put in eight years time, once he's reached a certain age, once his company's reached a certain point, then he doesn't lose it, regardless of what happens to his company or the country.

MAN. What are they waiting for? What the hell are they waiting for? Do they have to give us a certain quota, a certain number of people that have to be victims? Do they have to give us a certain amount of money? How many billions must it take before they do something about this? How many people have to starve? How many people have to lay on the sidelines and just hope and pray. How much misery do they want before they actually act upon it?

The Pensions program thus did in fact present views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all pension plans. Your judgments to the contrary, therefore, cannot be accepted as reasonable.

However, you further submit that in your judgment, "the fact that problems exist with some private pension plans" did not constitute "a controversial issue of public importance within the meaning of the fairness doctrine" since at the time of the broadcast the subject "did not . . . present an issue of significant public controversy." In support of this judgment, you note that:

. . . for years prior to the broadcast of PENSIONS, neither NBC nor the other networks, to the best of our knowledge, had telecast any program dealing extensively with private pensions. There was little discussion in any general circulation print media and no widely circulated books on the subject. In fact, there was no apparent public discussion, much less controversy, apart from that of a relatively small number of experts, businessmen and government officials who take a professional interest in the subject. There had been hearings in the last Congress on the subject, but at the time of broadcast NBC was breaking new ground journalistically on a subject about which the public, at that time, had little knowledge.

Serious questions as to the reasonableness of your judgment are raised, first, by the previously cited evidence that the program, taken in its entirety, went considerably beyond a mere presentation of "the fact that problems exist with some private pension plans." Its overall thrust was general criticism of the entire pension system, accompanied by proposals for its regulation. More importantly, however, your argument misinterprets the definition of a "controversial issue of public importance" as it pertains to the applicability of the fairness doctrine. As both the Commission and the courts have stated, underlying the fairness doctrine is "the paramount right of the American public to be informed as to events and issues of public importance." *Letter to Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969), citing *Red Lion Broadcasting Co.* v. *U.S.*, 395 U.S. 367 (1969). This right would be obviously vitiated if a broadcaster presenting one side of an issue of public importance could avoid his fairness obligations on the ground that members of the general public had little knowledge of the subject and hence were not engaged in any discussion of or debate on that issue.

As pointed out above, the Pensions program itself explicitly recog-

nized that the Congress is studying the subject of the overall performance of private pension plans and that there are legislative proposals to regulate the private pension system, and your response states that "The subject does appear to us to be of more than monetary importance." You do not dispute complainant's statements that such proposals have been opposed by various groups and spokesmen, including the National Association of Manufacturers, several labor unions, the Chamber of Commerce, and the Nixon administration. Under these circumstances, your judgment that the performance and proposed regulation of the private pension system did not constitute a controversial issue of public importance cannot be considered reasonable.

Given these findings, it does not appear that you have complied with your fairness doctrine obligation for affording reasonable opportunity for the presentation of views in contrast to those you have presented on the controversial issue of public importance here involved. Although two brief statements near the end of the one-hour program could be taken to present a contrasting view, they alone cannot be said to have afforded the reasonable opportunity contemplated by the fairness doctrine when compared to the views presented during the remainder of the program regarding private pension plans and the need for statutory regulation.[1] Moreover, information before the Commission indicates that no such contrasting views have been presented in other NBC programming and that you have formulated no definite plans to present them in the future. AIM states that its monitoring of NBC programs has not revealed any discussion of the operation of successful pension plans, and you state that NBC previously had not "telecast any program dealing extensively with private pensions." Moreover, you further indicate lack of prior programming which might have presented contrasting views when you state that "at the time of broadcast NBC was breaking new ground journalistically" on the subject. Finally, we note that you indicate no definite plans for future programming which might present contrasting views.

In view of the above, you are requested to inform the Commission within 20 days of the date of this letter how you intend to meet your fairness obligations with respect to the issue presented on the Pensions program.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Wash-

[1] The two statements were the following:

RUSSELL HUBBARD. Over a good number of years, the track record is excellent. It's unfortunate that every now and then some of the tragic cases make the newspapers and the headlines. But it's a question of perspective and balance. When you consider that there are thirty million people covered by the plans, that there are five million people receiving about seven billion dollars in benefits. I think that's a pretty good record. That's not to say that there aren't a few remaining loopholes that need closing but we ought to make sure that we don't throw out the baby with the wash water.

NEWMAN. This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.

ington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

FOR CHIEF, BROADCAST BUREAU,
WILLIAM B. RAY, *Chief*,
*Complaints and Compliance Division.*

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In Re Complaint by
JOE GLASSCOCK, MAYOR OF RED BANK, TENN.
Concerning Fairness Doctrine Re Station
WDXB

APRIL 23, 1973.

Hon. JOE GLASSCOCK,
*Mayor of Red Bank,*
*City Hall,*
*3117 Dayton Boulevard,*
*Red Bank, Tenn. 37415*

DEAR MAYOR GLASSCOCK: This is in reference to your complaint against station WDXB, Chattanooga, Tennessee, regarding comments by its disc-jockey, "Chickamauga Charlie," on the City of Red Bank's failure to participate in a Regional Transportation Authority.

In a letter dated January 3, 1973 you stated that the City of Red Bank recently chose not to participate in a Regional Transportation Authority; that in referring to this decision, "Chickamauga Charlie" ridiculed the City's transportation system by stating on January 3, that "the city's buses were bought from Trinity Christian Church, rebuilt by the city's rednecks, and functioned like the city's Commissioners—with one forward speed and four reverse"; that he also stated that you "promoted the city's decision to furnish its own system of transportation after having one too many spiked popsicles"; that these comments were "beyond the intent of public service announcements"; and that the reason for "Chickamauga Charlie's" behavior was his displeasure with the city's refusal to give him "stage time" for a "promotional 'Sparkle Day'" at the local high school.

In response to a Commission inquiry, WDXB stated that participation in the Chattanooga Area Rapid Transit Authority (CARTA) is a controversial issue of public importance in the Chattanooga area; that the statements attributed by you to "Chickamauga Charlie" did not constitute an attack on your "honesty, character, integrity or like personal qualities"; that these statements were in fact part of a satirical commentary on local events that is an integral part of the "Chickamauga Charlie" show; that you misquoted Charlie in that he did not accuse you of having one too many spiked popsicles but stated: "The story that alludes to Mayor Glasscock making the decision after having too many popsicles is entirely untrue. There seems to be concern on the part of some residents that if he had had just one more spiked popsicle they would have ended up with a camel caravan to Market Street (instead of a bus line) . . ."; that the reference to "spiked popsicles" was, in any event, meaningless except as a satirical broadside; that

even though no personal attack was involved, on January 5 the station sent you scripts of the January 2, 3, and 4 broadcasts, and offered you an opportunity to respond to them; that you did not acknowledge this invitation to respond; and that although your complaint did not raise the question of a fairness doctrine violation, WDXB is satisfied that it has acted in full accordance with its obligations under the fairness doctrine.

In response, in a letter dated February 27 you stated that you did not acknowledge the station's offer of broadcast time because "you were quite unwilling to enter into running commentary with a station that has complete control over the airways"; and that it is "totally unfair to report an opinion without complete knowledge of the facts." You question whether during the presentation of a controversial issue a "station has the right to gossip maliciously." With your letter you also included two scripts from the broadcasts in question.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

Under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. You do not allege that in its overall programming WDXB has failed to comply with the fairness doctrine on the issue herein, but your complaint did raise questions under the Commission's personal attack rule.

A personal attack, for purposes of the Commission's Rules, is an attack "upon the honesty, character, integrity, or like personal qualities of an identified person or group." Mere mention of a person or group, or even certain types of unfavorable references thereto, does not constitute a personal attack as defined by the Commission. Although the specific statements by "Chickamauga Charlie" were not complimentary to your position, they did not constitute an attack on your honesty, character, integrity or like personal qualities.

In any event, it is noted that the station sent scripts of several broadcasts, including the one in question, to you and offered you an opportunity to respond. Although you state that you did not respond to this offer because you were "unwilling to enter into running commentary with a station which has complete control over the airways," the Commission cannot consider fairness and personal attack complaints under such circumstances unless it is presented with specific evidence that an offer of an opportunity to respond was not made in good faith, or that after acceptance of such offer the circumstances were such that a reasonable opportunity was not in fact given.

With regard to your statement that it is unfair to report an opinion without complete knowledge of the facts, the Commission's policy in this area is set forth in its *Letter to Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969), a copy of which is enclosed. As you will note, the Commission believes that it, as the governmental licensing agency, should not attempt to determine the "truth" of a given situation or whether a news report has given the "truth." Rather, it will take action in such cases only when it has substantial extrinsic evidence that the licensee has deliberately distorted its news reports or staged news events.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

FOR CHIEF, BROADCAST BUREAU,
WILLIAM B. RAY, *Chief,*
*Complaints and Compliance Division.*

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In Re Complaint by
ROSE SODANO, UNION, N.J.
Concerning Fairness Doctrine, Re NBC

MAY 2, 1973.

MISS ROSE SODANO,
*290 Concord Avenue,*
*Union, N.J. 07083*

DEAR MISS SODANO: This is with reference to your letter of April 16, 1973 concerning the National Broadcasting Company's March 13, 1973 broadcast of the "America" series. You contend that Alistair Cooke's statement about Al Capone disparaged Italian Americans, and that since NBC has denied requests for equal time you are seeking advice from the Commission as to what action is available to prevent the future showing of this segment in its current form.

The selection and presentation of specific program material are responsibilities of the station licensee and, under Section 326 of the Communications Act, the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded each side. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming, which, of course, includes statements or actions reported in the news. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission reviews complaints to determine whether a licensee can be said to have acted reasonably and in good faith in his judgment.

According to NBC, "In identifying five immigrant families and the later fame of their offspring," the reference to Al Capone by Mr. Cooke, was not an attempt to single out his nationality. NBC also states that "we do not believe that this [comment] calls for equal time for rebuttal or for extending the discussion on the air, particularly since in our day-by-day coverage of events, issues and personalities, distinguished men of Italian background appear when they figure in the news and their appearance as leaders in their fields of achievement itself demonstrates the point you seek to make."

On the basis of the information presently before the Commission, it does not appear that the reference to Al Capone was such as to amount to presentation of a controversial issue of public importance.

It should also be pointed out that when a complaint is made to the Commission based on the fairness doctrine, the Commission expects the complainant to submit specific information including the following: (1) the specific issue of a controversial nature of public importance broadcast (complainant should include accurate summary of the views broadcast and presented by the station or network); (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the station's local area at the time of the broadcast; and (3) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming. It is hoped that the foregoing will serve to explain the Commission's role in these matters.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

FOR CHIEF, BROADCAST BUREAU,
WILLIAM B. RAY, *Chief,*
*Complaints and Compliance Division.*



109-039—73——6

F.C.C. 73-470

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR EXTENSION OF TEMPORARY WAIVER OF SECTION 76.501 OF THE COMMISSION'S RULES, BY FEDERATED MEDIA, INC., WITH RESPECT TO CABLE TELEVISION SYSTEMS SERVING WARSAW, WINONA LAKE, AND KOSCIUSKO COUNTY, IND., AND BROADCAST STATION WKJG-TV, FORT WAYNE, IND.

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1973; Released May 10, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART; COMMISSIONERS H. REX LEE AND REID CONCURRING IN THE RESULT.

1. On September 13, 1972, the Commission granted a joint request by Warner Communications Inc. and Cypress Communications Corporation for temporary waiver of Section 76.501(a) of the Commission's Rules.[1] *Warner Communications, Inc.*, FCC 72-826, 37 FCC 2d 260. The waiver was requested because a merger agreement[2] between the two companies would have created violations of the rule.[3] As a basis for the waiver request, Warner and Cypress stated that steps had already been taken toward separation of some of the interests and that they intended to complete total divorce of the common interests within the grace period finally determined by the Commission. The Commission, in granting the requested waiver, stated that such waiver would

[1] Section 76.501 of the Rules provides, in pertinent part, that:
"(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in: . . . (2) A television broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system; or (3) A television translator station licensed to the community of such system . . . (b) The provisions of paragraph (a) of this section are not effective until August 10, 1975, as to ownership interests prescribed herein if such interests were in existence on or before July 1, 1970 . . .: *Provided, however,* That the provisions of paragraph (a) of this section are effective on August 10, 1970, as to such interests acquired after July 1, 1970."

[2] Warner CATV Services, Inc., a wholly owned subsidiary of Warner Communications Inc., was merged into Cypress Communications Corporation. In turn, Warner Communications Inc. acquired all the voting stock of Cypress.

[3] The waivers which the petitioners requested and which we granted were for the following cross-relationships: (1) a Cypress-controlled cable system at Palm Springs with Cypress-controlled Television Broadcast Translator Stations K70AL, K77AV, K73AD, licensed to Desert Hot Springs and Palm Springs, California; (2) Cypress-controlled cable systems at Bakersfield and environs, Shafter, Wasco, Oildale, McFarland, and Delano, with Station KBAK-TV, Bakersfield, a station in which Cypress principals have interests; (3) WCI-controlled cable systems at Taft, Ford City, South Taft, Taft Heights, and Victorville, California, with KBAK-TV; (4) WCI-controlled cable systems at DeKalb and Sycamore, Illinois, with Station WSNS-TV, Chicago, a station in which Cypress principals have interests; and (5) Cypress controlled cable systems at Warsaw, Winona Lake, and Kosciusko County, Indiana, with Station WKJG-TV, Fort Wayne, Indiana, a station in which WCI principals have interests.

expire "on (1) August 10, 1973, or on (2) the 90th day following final Commission action on pending requests for reconsideration of the adoption of Section 76.501 of the Rules, whichever first occurs."

2. In January, 1973, the Commission denied the requests for reconsideration of Section 76.501 of the Rules. *Memorandum Opinion and Order in Docket 18397*, FCC 73–80, 39 FCC 2d 377 (released January 31, 1973), *denying reconsideration of* 23 FCC 2d 816 (1970). Consequently, the waiver we granted Warner and Cypress on September 13, 1972, expires on May 1, 1973.

3. Federated Media, Inc., licensee of Station WKJG–TV, Fort Wayne, Indiana, has requested that, with regard to the overlap of proscribed interests in WKJG–TV and cable television systems at Warsaw, Winona Lake, and Kosciusko County, Indiana, the Commission extend the waiver to August 10, 1975, or, alternatively, to August 10, 1974. In support of its request, Federated Media Inc. states that (1) of the five cross-relationships for which waiver was granted, all except this one have been disposed of;[4] (2) it would be "extremely difficult, if not impossible" to "reasonably and quickly" divest the prohibited interests; and (3) the request does not undercut the Commission's cross-ownership policies since many other cable/broadcast television cross interests may remain in existence until 1975 and the cross interests here are *de minimis*.

4. Prior to the Warner/Cypress merger, the cable systems at Warsaw, Winona Lake, and Kosciusko County, Indiana, were owned by Cypress Communications Corporation. Alfred R. Stern, a director of Warner Communications Incorporated, and certain other officers and directors of Warner, are principals of Federated Media Inc.[5] Consequently, the merger produced the cross interests between the cable systems and the television station. The merger was consummated in September, 1972; thus the cross interests in question are not of the pre-July 2, 1970, category for which we have allowed until August 10, 1975 for divestiture. Rather, this is a post-July 2, 1970, interest which would have been prohibited but for the temporary waiver which we granted to aid the merger and which we are now asked to extend. On the other hand, WKJG–TV is a UHF station and there was uncertainty until January 31, 1973, whether or not co-located UHF/cable cross ownership interests would be prohibited at all since one of the issues raised in the requests for reconsideration of the rule was a general exemption for UHF television stations from the scope of Section 76.501(a)(2). Paras. 15–16, 44, *Memorandum Opinion and Order in Docket 18397*, FCC 73–80, 39 FCC 2d 377.

5. When we granted the temporary waiver of Section 76.501 of the Rules, we stated that some of the elements that led to the judgment were that the duration of the waiver was quite short, that denial of the temporary waiver would threaten the petitioners with an unjustifiable financial hardship, and that the few systems in question would not

[4] In the case of the Palm Springs and Desert Hot Springs translators, timely disposition is contingent upon Commission consent to transfer the licenses pursuant to an executed agreement. Applications were filed with the Commission on May 1, 1973.

[5] WKJG–TV was previously licensed to TeleVision Communications Corporation. In January, 1972, Warner Communications Inc. acquired TeleVision Communications. Federated Media Inc. was created at that time by the principals of TeleVision Communications as a spin-off to retain the broadcast facilities (which also include WBNB–TV, Charlotte Amalie, Virgin Islands, and FM Broadcast Station KNWA, Fayetteville, Arkansas).

significantly detract from the purposes of Section 76.501 but were minor incidents of a larger transaction which might generate substantial financial resources to help the expansion of the cable industry. Although the four other cross interests for which we granted a waiver have been remedied, Federated Media Inc. has given us no reason why it has not been able to rectify the present cross ownership situation. Nor has Federated Media Inc. informed the Commission what attempts have been made to rectify the situation or even how it plans to do so. Federated Media Inc. asserts that the cross ownership here is *de minimis* since the three systems, which share a common head-end, have only 946 subscribers and there are five television stations in addition to WKJG–TV which place predicted Grade B or better signals over the cable systems' areas. However, WKJG–TV is a network affiliated station in a major television market, and the cable systems involved recently received certificates of compliance to add two distant independent signals and a distant educational signal, which will probably increase the number of subscribers. Under these circumstances, we find that a grant of the requested extension of time is not in the public interest. Federated Media Inc. has not shown us sufficient cause to further extend our waiver of Section 76.501 of the Rules to either August 10, 1975, or August 10, 1974.

6. However, due to the general uncertainty of the status of Section 76.501 of the Rules pending reconsideration and due to the uncertainty during the pendency of the present request for extension of the waiver, we will grant an extension of the waiver until October 31, 1973. This extension will afford the concerned parties a reasonable time to rectify the prohibited cross interests. However, we do not contemplate granting any further extensions beyond October 31, 1973.

Accordingly, IT IS ORDERED, That the request that the Commission extend its September 13, 1972 waiver of Section 76.501 of the Rules to August 10, 1975, or, in the alternative, August 10, 1974, with regard to Broadcast Station WKJG–TV, Fort Wayne, Indiana, and cable television systems at Warsaw, Winona Lake, and Kosciusko County, Indiana, filed by Federated Media Inc., IS DENIED.

IT IS FURTHER ORDERED, That such waiver shall be extended to October 31, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-487

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (CASTALIA AND SANDUSKY, OHIO) | Docket No. 19689<br>RM-1953 |

REPORT AND ORDER

(Adopted May 9, 1973; Released May 10, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has before it its Notice of Proposed Rule Making adopted February 14, 1973 (38 Fed. Reg. 5193), inviting comments on a proposal by the Commission to assign Channel 249A to either Castalia or Sandusky, Ohio. The proceeding was instituted on the basis of a petition filed by The Wayside Temple Church, Castalia, Ohio, proposing to assign Channel 249A to Castalia, Ohio. Castalia (1,045 population) is located in Erie County, about 7 miles southwest of Sandusky, Ohio. It has no local broadcast transmission service. Channel 249A could be assigned to Castalia in conformance with the Commission's minimum mileage separation rule and without affecting other assignments in the FM Table. Interested parties were invited to comment on the Commission's proposal on or before March 28, 1973, and could reply to such comments on or before April 6, 1973. Supporting comments were filed by petitioner. An opposition was filed by Miller Broadcasting Company (formerly Lake Erie Broadcasting Company) licensee of Station WLEC(AM) and WLEC-FM, Sandusky, Ohio (Miller Broadcasting).

2. In our Notice we stated that it appeared that assignment of Channel 249A to Sandusky, Ohio, rather than Castalia might be more in the public interest since the channel would then be available to Sandusky and to other communities located within 10 miles thereof (Section 73.203), which includes Castalia. Sandusky (32,674 population) is located in Erie County (75,909 population) about 50 miles southeast of Toledo and presently has in operation a Class IV AM station and a Class B FM station. Under our assignment criteria Sandusky has a population the size of which would warrant its assignment of a second FM channel.

3. The timely filed opposition of Miller Broadcasting contends that Sandusky is a community with operating AM and FM stations providing local service and is a community with four other broadcast stations located within a radius of 25 miles. It adds that providing Sandusky with an unnecessary additional third local station would preclude use of Channel 249A at a variety of communities in Ohio which have no present local broadcast service (Clyde, population

5,503; Mt. Gilead, population 2,971; Oak Harbor, population 2,807; and New Washington, population 1,251), and communities which have only one local broadcast service (Fremont, population 18,490; Galion, population 13,123; and Bucyrus, population 13,111). It further reasserts that the assignment of Channel 249A to Sandusky would have serious and detrimental effect in depriving other communities of needed service.

4. We have given careful consideration to the comments filed by the petitioner and the opposition, and believe that Channel 249A should be assigned to Sandusky, Ohio. Although the opposition has contended that such an assignment would deprive other communities of needed service, no interest in having a channel assigned to those communities has been shown. It would not be in the public interest to assign a channel and have it lie fallow. An interest has been shown for its use at Castalia which is located within 10 miles of Sandusky, and the assignment of the channel to Sandusky would allow its use at Castalia (Section 73.202). We believe that the assignment of Channel 249A to Sandusky, a community of 32,674 persons, would provide for a second local FM broadcast service to the community and the surrounding area, and would be in the public interest. The Canadian Government has no objection to the proposal, and it conforms domestically with all minimum spacing requirements.

5. Authority for the adoption of the amendment contained herein appears in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

6. In view of the foregoing, IT IS ORDERED, that effective June 22, 1973, Section 73.202(b) of the Commission's Rules, the FM Table of Assignments IS AMENDED to read as follows:

| City: | *Channel No.* |
|---|---|
| Sandusky, Ohio | 249A, 274 |

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-338

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF FRIENDLY BROADCASTING CO., INC., LICENSEE OF RADIO STATION WSHB, RAEFORD, N.C.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated February 23, 1972, addressed to Friendly Broadcasting Company, Inc., licensee of Radio Station WSHB, Raeford, North Carolina, and (2) licensee's response of March 27, 1972, to the Notice of Apparent Liability.

2. The Notice of Apparent Liability in this proceeding indicated that the licensee was subject to apparent liability for forfeiture in the amount of one thousand dollars ($1,000) for apparent willful or repeated violation of Section 73.52(a) of the Commission's Rules in that the station was operated with power in excess of that authorized, as shown by the operating logs on dates and with power as follows:

*Daytime*

January 25, 1971, 1114 watts, 11.4%
January 27, 1971, 1114 watts, 11.4%
January 29, 1971, 1114 watts, 11.4%
January 30, 1971, 1114 watts, 11.4%
February 8, 1971, 1179 watts, 17.9%
February 13, 1971, 1114 watts, 11.4%
February 19, 1971, 1114 watts, 11.4%
February 20, 1971, 1114 watts, 11.4%
February 22, 1971, 1179 watts, 17.9%
March 3, 1971, 1114 watts, 11.4%

*Nighttime*

January 20, 23, 24, 26, 30, 31, 1971, 262.9 watts, 5.16%
January 21, 1971, 278.6 watts, 11.4%
January 22, 25, 27, 28, 29, 1971, 294.8 watts, 17.9%
February 1, 2, 3, 4, 5, 7, 8, 9, 11, 13, 15, 19, 22, 26, 1971, 262.9 watts, 5.16%
February 16, 24, 25, 1971, 278.6 watts, 11.4%
February 10, 12, 23, 25, 1971, 294.8 watts, 17.9%
March 3, 4, 7, 8, 1971, 262.9 watts, 5.16%
March 2, 5, 10, 1971, 294.8 watts, 17.9%

Station WSHB is licensed to operate with power of 1,000 watts during daytime hours and with power of 250 watts during nighttime hours, as indicated on the license.

3. Licensee responds to the Notice of Apparent Liability stating that "we were also having a problem with that time . . . it would have been impossible to obtain the type of readings that were being recorded." However, no substantiation of this statement is offered to show low line voltages. The licensee further states that the power entries in the operating logs were not accurate and contained a parallax error caused by the reading of the meters while the operators were seated, which would not have been present if the readings were made head-on. However, the licensee does not state how much of an error was being entered nor provide substantiating evidence that such an error in fact occurred. It also is noted that in its reply to the Notice of Violation issued after the inspection, the licensee did not assert that such an error existed, but merely stated that the operators had been "reinstructed in proper operation" and that "limit marks have been placed on the antenna meters for both operating powers." In these circumstances, it appears that the station was operated with power in excess of that authorized on the dates and with power as herein specified. The licensee also claims that the station market was depressed at the time requiring the employment of operators not fully competent, and therefore requests that the licensee be totally relieved of the forfeiture or that the amount thereof be reduced.

4. Licensees are responsible for the acts or omissions of their employees. *International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Considering all of the circumstances of this case, we are not persuaded to rescind, remit or mitigate the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That Friendly Broadcasting Company, Inc., licensee of Radio Station WSHB, Raeford, North Carolina, FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated failure to abide by Section 73.52(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days from the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Friendly Broadcasting Company, Inc., licensee of Radio Station WSHB, Raeford, North Carolina.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-256

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>GULF COAST-BELLAIRE CABLE TELEVISION,<br>BELLAIRE, TEX.<br>For Certificate of Compliance | CAC-1684<br>TX302 |

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 14, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. Gulf Coast-Bellaire Cable Television has applied for a certificate of compliance to begin cable television service at Bellaire, Texas, a community of 18,978 persons located within the Houston, Texas television market (#15). The applicant proposes to carry the following Texas television signals:

KHOU-TV (CBS), Houston, Tex.
KPRC-TV (NBC), Houston, Tex.
KTRK-TV (ABC), Houston, Tex.
KVRL (Ind.), Houston, Tex.
KHTV (Ind.), Houston, Tex.
KUHT-TV (Educ.), Houston, Tex.
KTVT (Ind.), Fort Worth, Tex.
KDTV (Ind.), Dallas, Tex.
KWEX-TV (Ind.), San Antonio, Tex.
KLRN-TV Educ.), San Antonio, Tex.

Although KWEX-TV is nominally an independent station, Gulf Coast proposed its carriage on the basis that KWEX-TV broadcasts predominantly in the Spanish language. Hence, Section 76.61(e)(1) of the Rules permits its carriage.[1]

2. This application is challenged by Gulf Television Corporation, licensee of Station KHOU-TV, Houston. Gulf Television argues that the application should be dismissed or denied because Gulf Coast has not satisfactorily justified the proposed carriage of KWEX-TV as a station which broadcasts predominantly in a foreign language. And, in the event KWEX-TV broadcasts mostly Spanish language programming, Gulf Television argues that Section 76.61(e)(1) of the Rules should be construed to limit the carriage of KWEX-TV to that portion of its programming which is, in fact, foreign language fare.

[1] Section 76.61(e)(1) provides that
"In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry:
(1) Any television stations broadcasting predominantly in a non-English language; . . ."

3. The applicant responded by filing a letter, dated February 20, 1973, from James Meek, Vice President of Spanish International Broadcasting Corporation, the licensee of Station KWEX–TV. Mr. Meek states that

> "Programming at KWEX–TV, Channel 41, is broadcast 100% in the Spanish language. We have no variations in the proportion of Spanish language programming to English language programming as our Spanish language format is of a permanent nature."

In these circumstances, we believe Gulf Television's objection to carriage of KWEX–TV is satisfactorily answered and hold that it may be carried without conditions. Par. 96, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 180.

4. Although not raised in the objections, we believe it appropriate to note certain minor variations in Gulf Coast's franchise which was awarded by the Bellaire City Council on April 5, 1971. The initial term of the franchise is 15 years; subscriber rates are established which can only be changed with the consent of the City Council; a local office must be maintained, service must commence by July, 1973, and an annual fee of 4 percent of subscriber revenues must be paid to the City. Only substantial compliance with Section 76.31 of the Rules must be demonstrated and measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1105, 38 FCC 2d 10, we find the franchise substantially complies with Section 76.31 of the Rules, and that it is appropriate to grant the above-captioned application until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance filed December 6, 1972, by Gulf Coast-Bellaire Cable Television (CAC–1684) for Bellaire, Texas, IS GRANTED.

IT IS FURTHER ORDERED, That the "Objection of Gulf Television Corporation Pursuant to Section 76.27" filed February 5, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-458

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In the Matter of<br>AMENDMENT OF SECTION 89.511 OF SUBPART P OF PART 89 OF THE COMMISSION'S RULES RELATING TO LICENSING OF SCHOOL BUS OPERATORS | Docket No. 19730 |

NOTICE OF PROPOSED RULEMAKING

(Adopted May 3, 1973; Released May 8, 1973)

BY THE COMMISSION:

1. In this proceeding, we have under consideration amendment of Sections 89.511(a) and (d) of our Rules. These regulations govern eligibility of school bus operators and permissible communications in radio systems authorized in the Special Emergency Radio Service.

2. In recent years, it has become apparent that there is a need to eliminate some of the requirements of these rules, specifically those which provide that only persons or organizations operating school buses in "rural" areas may be licensed and which allow "only messages pertaining to the safety of life or property or urgent messages relating to buses which have become inoperative on regular runs."

3. While the limitations we mention undoubtedly served useful purposes at the time they were adopted, the nature of school bus operations has now changed; and it has become desirable to permit broader use of the available radio channels by eligible school bus operators. To illustrate, some urban areas have grown to such an extent that regions once considered "rural" are now relatively well populated. Nevertheless, school buses must travel through one type of area to get to the other. Here, the need for radio communications still obtains, even though the population density has increased, overall, in the school districts served by school bus systems.

4. Further, it has become increasingly important to maintain regular schedules. This is particularly the case where handicapped children are involved, as they should not be left unattended when their school bus is delayed. Thus, the occasion can arise, as in fact it has, when it is important for a driver to notify school officials that he is late or is being delayed in traffic and that a particular child cannot be reached on time. In such instances, other arrangements should be made; but, without radio communications, this is often impossible or impractical. To correct this situation, then, we propose to amend the rules to eliminate these restrictions, maintaining, however, some limitations to preserve the basic integrity of the school bus service, itself.

5. The proposed amendments to the rules are issued pursuant to the

authority contained in Sections 4(i) and 303 (e) and (r) of the Communications Act of 1934, as amended.

6. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before July 10, 1973, and reply comments on or before July 25, 1973. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

7. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all statements, briefs or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Sections 89.511 (a) and (d) of Subpart P of Part 89 of the Commission's Rules are amended to read as follows:

§ *89.511 School buses.*

(a) *Eligibility.* Persons or organizations operating school buses on a regular basis over regular routes are eligible in this service.

* * * * * * *

(d) *Permissible communications.* Stations licensed to school bus operators may be used to transmit messages pertaining to either the efficient operation of the school bus service or the safety and general welfare of the students they are engaged in transporting.

F.C.C. 73–460

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In Re<br>MEMPHIS CATV, INC., MEMPHIS, TENN.<br>For Certificate of Compliance | CAC–865<br>TN063 |

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1973; Released May 9, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE, AND REID CONCURRING IN THE RESULT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. On January 22, 1973, Community Cablecasters, Inc., filed a "Petition for Reconsideration" directed against the Commission's decision in *Memphis CATV, Inc.*, FCC 72–1191, 38 FCC 2d 894, which authorized the operation of a cable television system at Memphis, Tennessee. The petitioner (which indicated its intention to apply for another Memphis cable television franchise) challenges our action on two grounds: (a) the application for a certificate of compliance filed by Memphis CATV, Inc., was deficient since the ownership information submitted with the application was incomplete; and (b) the Commission acted prematurely because any local competitor of Memphis CATV will be forced to operate pursuant to a franchise which is wholly consistent with the cable television rules, while the franchise awarded Memphis CATV only substantially complies with these same rules, to the alleged advantage of the latter.

2. Memphis CATV argues that Community has failed to satisfy the standing and pleading requirements of Section 1.106(b) of the Rules.[1] Community did not participate in the earlier stages of this proceeding, and did not explain its absence. According to Memphis CATV, considerations of administrative finality compel the denial of reconsideration. Moreover, the interests alleged to have been adversely affected by the Commission's action are simply too speculative, because Community's posture in this proceeding is merely that of a potential applicant for another Memphis cable television franchise. This failure to "state with particularity" the adverse effects of the Commission's action, contends Memphis CATV, similarly requires a denial of reconsideration.

[1] Section 1.106(b) of the Rules provides that,
Except where the Commission has denied an application for review without specifying reasons therefor, any party to the proceeding, or any other person aggrieved or whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which he is aggrieved or his interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

3. The requirements of Section 1.106(b) are clear, and Community has failed to address them. Consequently, the petition for reconsideration is subject to denial on procedural grounds alone. Notwithstanding these procedural deficiencies, we have examined Community's arguments to determine whether the public interest requires that our previous decision be set aside or modified. As explained below, we find that it does not.

4. Although Memphis CATV filed FCC Form 325 with its application, Community contends that the failure to disclose fully the identity of local ownership contravend Section 76.13(a)(2) of the Commission's Rules which requires that an applicant file

> A copy of FCC Form 325 "Annual Report of Cable Television Systems," supplying the information requested as though the cable system were already in operation as proposed.

As submitted on the applicant's Form 325, eighty percent of Memphis CATV is owned by Athena Cablevision Corporation, a wholly-owned subsidiary of Athena Communications Corporation. The remaining twenty percent is held by local residents. The ownership of Athena Communications Corporation was fully disclosed, but Memphis CATV stated that complete data on local ownership awaited the completion of further business arrangements. Community argues that, inasmuch as Form 325 is an "integral part of the application," a failure to submit complete ownership information invalidates our grant of the application because the presumption that the Memphis City Council has weighed the qualifications of the applicant is rebutted by the absence of such disclosure in the application. The competitive disadvantage is explained as follows: The franchise awarded any competitor of Memphis CATV must strictly comply with Section 76.31 of the Rules, and it will include obligations much more burdensome to the cable system than those now demanded of Memphis CATV. Such a competitive imbalance will adversely affect both the community and the cable systems.

5. The submissions on Form 325 are defended as being all the information presently available to Memphis CATV. When additional data is at hand, it will be filed with the Commission. In the meantime, Memphis CATV asserts that the ownership of the system has been subjected to continuing local scrutiny as the franchise is even now being amended, and no one has questioned its qualifications.

6. Memphis CATV furnished complete data regarding the parent corporation, Athena Communications Corporation, and similar data has been promised with respect to local ownership when this information is available. We find this acceptable since, in net effect, it appears that Athena presently owns the corporation but plans to dispose of a minority interest in the future.

7. We are advised that the City of Memphis has rejected all other applicants for local cable television francises (Letter, dated March 30, 1973, from the City Attorney of Memphis, Tennessee, to the Chief, Cable Television Bureau). This action by the City of Memphis serves to moot Community's remaining objection to the certification of Memphis CATV.

In view of the foregoing, the Commission finds that reconsideration of its action in *Memphis CATV, Inc.*, FCC 72–1191, 38 FCC 2d 894, would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed January 22, 1973, by Community Cablecasters, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

40 F.C.C. 2d

F.C.C. 73-280

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In Re<br>MULTI-PIX OF IDAHO, INC., BURLEY, RUPERT, HEYBURN, AND PAUL, IDAHO<br>Requests for Waiver of Section 76.93(b) of the Commission's Rules | CSR-47 (ID 002)<br>CSR-48 (ID 003)<br>CSR-49 (ID 051)<br>CSR-50 (ID 052) |

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 14, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. Multi-Pix of Idaho, Inc. operates cable television systems at Burley, Rupert, Heyburn, and Paul, Idaho. Each of these systems is located within the predicted Grade B contour of Television Broadcast Station KMVT, Twin Falls, Idaho, and within the Mountain Time Zone. As such, they are presently required to provide KMVT with same-day network program exclusivity, pursuant to Section 76.93(b) of the Commission's Rules and our recent decision in *Idaho Video, Inc.*, FCC 72-1046, 38 FCC 2d 127. On July 28, 1972, Multi-Pix filed a "Petition for Special Relief and for Consideration of Previously Filed Relevant Pleadings" seeking waiver of Section 76.93(b) of the Rules in order to provide simultaneous-only exclusivity to KMVT. The KLIX Corporation, licensee of KMVT, has opposed the petition.[1]

2. In support of its waiver request, Multi-Pix argues that: (a) persons in the Twin Falls television market prefer to view network programs at the time they are broadcast by the Salt Lake City stations rather than at the earlier hours chosen by Station KMVT; (b) same-day exclusivity was meant to protect a station's programming only against pre-release by a lower priority station, not against post-release; (c) providing simultaneous-only exclusivity will not cause economic injury to KMVT; (d) Section 76.93(b) of the Rules was not meant to apply where all stations carried by the cable system were located in the same time zone; and (e) the new prime time hours of 6-10 p.m. in the Mountain Time Zone for purposes of the "prime time access rule" (see Docket 19475) will lessen the need for same-day exclusivity by minimizing disruptions to broadcast programming schedules.

3. KMVT is a CBS affiliate that also carries NBC and ABC programming. Network feeds to Salt Lake City are immediately broadcast by KMVT but are broadcast on a one-hour delayed basis by the Salt Lake City network affiliates. Without same-day exclusivity KMVT alleges that it must either conform to the Salt Lake City programming schedule or risk a loss of viewers to cable systems carrying the Salt

[1] We have also considered all pleadings filed in CSR-46, and all pleadings filed in CSR-47, CSR-48, CSR-49, and CSR-50 prior to July 28, 1972.

Lake City stations. KMVT asserts that conforming to Salt Lake City schedules is undesirable due to the prohibitive cost of adequate tape delay equipment ($120,000) and to the need for independence by Twin Falls viewers from the preferences and interests of Salt Lake City viewers. Further, simultaneous-only exclusivity will reduce KMVT's prime time exclusivity protection by 55 per cent,[2] thus fragmenting a substantial part of an already small audience (40,000 households). Finally, KMVT argues that Multi-Pix has in the past provided same-day exclusivity without economic injury and retains the technical equipment to continue providing it.

4. We rule on Multi-Pix's waiver arguments as follows: (a) the Commission places responsibility for the selection and scheduling of broadcast programming on each broadcast licensee, and will not normally interfere with the exercise of a broadcaster's discretion. In the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, the Commission recognized that same-day exclusivity in the Mountain Time Zone would have some impact on viewing habits, but concluded that this form of exclusivity was an adequate compromise of the competing interests; (b) the same-day exclusivity rules are meant to apply without regard to the distinction between pre-released and post-released programming. See *Reconsideration of the Cable Television Report and Order*, *supra*, and *Second Report and Order in Dockets 14895 et al.*, 2 FCC 2d 725; (c) in the *Reconsideration of the Cable Television Report and Order*, *supra*, we determined that, with the exception of Mountain Time Zone television stations licensed to designated communities in the first 50 major television markets, Mountain Time Zone stations are entitled to same-day exclusivity regardless of economic need; (d) the applicability of Section 76.93(b), as amended, does not turn on whether all of the stations involved in an exclusivity controversy are located in the same time zone. Rather, Section 76.93 (b) confers a same-day exclusivity right on any "television station licensed to a community in the Mountain Standard Time Zone that is not one of the designated communities in the first 50 major television markets." The time zone "problem" to which the rule is addressed stems from the fact that stations in the Mountain Time Zone feel constrained to carry, at different times, network programming that originates in other time zones. See para. 29, *Reconsideration of the Cable Television Report and Order*, *supra;* and (e) since Multi-Pix does not specify the extent to which the change in the "prime time access rule" has affected or could affect program schedules or exclusivity obligations, its argument must be rejected as speculative. Lacking contrary data, we rule that in this case a 55 per cent loss of protected prime time program hours, as specified by KMVT, is too great to permit a change from same-day exclusivity. See *Magic Valley Cable Vision, Inc.*, FCC 73–94, —— FCC 2d ——.

In view of the foregoing, we find that grant of the requested waiver of Section 76.93(b) of the Rules would not be consistent with the public interest.

[2] KMVT indicates that during prime time, same-day exclusivity provides 14½ hours per week of protection and simultaneous exclusivity would provide only 6½ hours' protection. It also indicates a protection loss of 11½ hours per week during the 5 p.m. to sign-off hours and 13 hours per week on an all-day basis.

Accordingly, IT IS ORDERED, That the "Petition for Special Relief and for Consideration of Previously Filed Relevant Pleadings," filed by Multi-Pix of Idaho, Inc., IS GRANTED to the extent indicated above (see footnote 1) and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief Against the Above Named CATV Systems" (CSR–47, 48, 49, and 50), filed by The KLIX Corporation, IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED, That Multi-Pix of Idaho, Inc. SHALL CONTINUE to comply with the requirements of Sections 76.91 and 76.93(b) of the Commission's Rules on its cable television systems at Burley, Rupert, Heyburn, and Paul, Idaho.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-457

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In the Matter of<br>REQUEST FOR AMENDMENT OF PARTS 81 AND 83 OF THE RULES TO EFFECT CHANGES IN CHANNEL DESIGNATORS FOR VHF FREQUENCIES AVAILABLE IN THE MARITIME MOBILE SERVICE BY NORTH PACIFIC MARINE RADIO COUNCIL | RM-2106 |

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1973; Released May 8, 1973)

BY THE COMMISSION:

1. The Commission has before it the Petition for Rule Making, filed by the North Pacific Marine Radio Council (NPMRC), for amendment of Parts 81 and 83 to add the suffix letter "A" to the channel designators of various maritime services VHF frequencies.

2. In their petition, NPMRC states that confusion arises from the differences between the designation and arrangement of VHF channels set forth, on the one hand, in Appendix 18 to the Radio Regulations, International Telecommunication Union, and, on the other hand, in Parts 81 and 83 of the FCC Rules. More specifically, all except five of the VHF channels listed in Appendix 18, ITU Radio Regulations, employ two frequencies, one for transmission and another for reception, which are designated by numbers 01 through 28 and 60 through 88. In parts 81 and 83, with the exception of VHF channels 20, 24 through 28 and 84 through 87, the VHF channels which are available to the maritime services are single frequency, that is, the same frequency is used for transmission and reception. In particular, NPMRC asks that in Parts 81 and 83 the suffix letter "A" be added to VHF channel designators 07, 18, 19, 65, 66, 78, 79, 80 and 88, in order to distinguish between the single frequency channels available in the United States and the two-frequency channels available under ITU Appendix 18.

3. In support of this request, NPMRC points out that confusion arises, with consequent channel congestion, from attempts of foreign vessels to communicate with United States coast and ship stations with their VHF equipment set for two-frequency operation; and by United States vessels in attempting to communicate with foreign coast and ship stations with this equipment set for single frequency operation. In the case of the foreign vessel, communication cannot be established because the United States ship and coast stations employ single frequency operation; whereas, in the case of the United States vessel, communication cannot be established because the foreign coast and ship stations employ two-frequency operation. NPMRC also refers to

the case where a licensee orders crystals for a VHF channel using FCC channel designator, only to have his order filled by the vendor for the Appendix 18 two-frequency arrangement.

4. We are not persuaded that the adverse effects to which NPMRC refers are of wide enough scope to warrant amendment of the rules. Further, if the rules were amended, we doubt that such action would have any substantial impact upon some of the undesirable situations referred to by NPMRC. For example, with reference to the particular case of foreign vessels calling United States coast or ship stations, we doubt that amendment of the FCC Rules would have impact upon the procedure employed by those vessels in the setting of their VHF transceivers. Also, in the case of vendors supplying the wrong crystals, it would seem that in any case the licensee should designate in his order to the vendor whether he wishes the crystal for two-freqency or for single frequency operation.

5. Lastly, a world radio conference on marine matters is scheduled to be convened by the International Telecommunication Union (ITU) early in 1974. We expect that there will be changes made at that conference in regard to the use of marine VHF frequencies which, consequentially, will have impact upon the use of VHF frequencies within the United States. Taking into account the time required to promulgate and finalize rule amendments as requested by NPMRC, only a few months would remain before the ITU conference was convened. If, as expected, that conference develops further changes with regard to the use of VHF, the rule amendments requested by NPMRC would be premature.

6. Accordingly, the subject petition by NPMRC IS DENIED without prejudice to the right of the petitioner to again petition for rule change following availability of the final acts of the above described ITU conference.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-390

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
NORTHERN TELEVISION, INC. (KFRB), FAIRBANKS, ALASKA
Has: 900 kHz, 10 kW, U
Requests: 820 kHz, 10 kW, U
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted April 11, 1973; Released April 19, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has before it the above-captioned application and a request for waiver of section 73.25(a)(4) of the rules.

2. The proposed nighttime operation is in contravention of section 73.25(a)(4) because the proposed 0.025 mV/m-10% skywave contour penetrates the border of the 48 contiguous states.

3. In support of the request for waiver, the applicant claims that for many years the existing operation provided secondary skywave service far beyond the normally protected nighttime groundwave service contour but that Canadian co-channel station CJVI at Victoria, British Columbia, caused a deterioration of this skywave service area and limited the groundwave service area to the 2.64 mV/m contour. This skywave service, the applicant states, was extremely important to the vast rural areas and numerous small villages. The proposed operation would reestablish this secondary skywave service. Secondly, KFRB states that because of the special needs and conditions prevailing in Alaska, the Commission applies more liberal allocation standards to that state. Furthermore, it is submitted that the only noncompliance is the penetration of the proposed 0.025 mV/m-10% skywave into a *small area* of the lower 48 States (emphasis added). Finally, it is claimed that no nighttime interference would be caused to co-channel I-A facilities because the proposed 0.025 mV/m-10% skywave contour would not overlap the 0.5 mV/m-50% skywave contour of WBAP, Fort Worth, Texas.

4. The Clear Channel Report and Order (31 FCC 565, 21 RR 1801) designates 820 kHz, among other frequencies, as a channel for which consideration of future uses was reserved. In order that the possible future utilization of the channel would not be prejudiced, section 73.25(a)(4) was promulgated to assure that all practical options would remain open while at the same time permit the operation of unlimited time standard broadcast stations in Alaska, Hawaii, Virgin Islands, or Puerto Rico.

5. Contrary to the KFRB argument that only a "small area" of the lower 48 States is penetrated by the proposed 0.025 mV/m-10% skywave contour, we find that this area consists of approximately 564,000 square miles or about one-fifth of the total land area of the 48 contiguous states.

6. Since KFRB is a class II facility, protection to any possible secondary skywave service area is not afforded and reliance on any such service area is misplaced. The normally protected nighttime service contour of KFRB is the 2.5 mV/m groundwave contour. KFRB claims that even this service area has been reduced to the 2.64 mV/m groundwave contour based on limits from two Canadian stations. We find, however, that the KFRB 2.5 mV/m groundwave contour is adequately protected by the Canadian stations.

7. The proposed operation would serve essentially the same areas and populations within its normally protected contours as served by the present operation. Clearly, the special needs and conditions prevailing in Alaska can be met equally well with either operation.

8. Finally, we would note that even if KFRB were authorized a change in frequency to 820 kHz and even if such operation did provide some secondary service, its *normally protected* nighttime service contour would still be 2.5 mV/m. In accordance with the provisions of the NARBA, Canada could at any time notify a co-channel operation which would completely destroy any secondary service that was being provided by KFRB. As a matter of fact, this appears to be precisely the situation which has occurred on the present frequency of KFRB.

9. We have fully considered the comments submitted in support of the request for waiver of section 73.25(a)(4), but we find that the circumstances presented are not sufficient to warrant favorable consideration of the request for waiver. Since the applicant has failed to set forth sufficient reasons, if true, to justify waiver, there is no need to conduct a hearing and the application will be returned. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, (1956).

10. Accordingly, IT IS ORDERED, That the request of Northern Television, Inc., for a waiver of section 73.25(a)(4) IS DENIED and the application IS HEREBY RETURNED as unacceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-507

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In Re Applications of<br>DALE A. OWENS, LAKEWOOD, WASH.<br>Requests: 1480 kHz, 1 kW, Day | File No. BP-19252 |
| CLAY HUNTINGTON, LAKEWOOD, WASH.<br>Requests: 1480 kHz, 1 kW, Day<br>For Construction Permits | File No. BP-19291 |

ORDER

(Adopted May 10, 1973; Released May 11, 1973)

BY THE COMMISSION:

1. The above applications seek the frequency assigned to station KOOD, Lakewood, Washington. The station has been silent for several years and the Commission, on September 13, 1972, dismissed the licensee's application for renewal due to lack of prosecution pursuant to section 1.568(b) of our rules.

2. On April 12, 1973, the Commission issued a public notice (No. 96421) stating that the above applications had been accepted for filing and notifying interested parties that conflicting proposals, in order to be consolidated for hearing, had to be tendered for filing no later than May 25, 1973. Due to clerical error, however, the Commission failed to take into account an informal petition for reconsideration, filed September 27, 1972, of the action dismissing station KOOD's renewal application. This petition is still outstanding. Thus, since final dispositive action has not been taken on KOOD's application for renewal, we are setting aside our acceptance of the above applications and no further action will be taken on the Owens and Huntington proposals until final action is taken with respect to the renewal of license for station KOOD.

3. Accordingly, IT IS ORDERED, that the Commission's action of April 11, 1973, promulgated in the public notice of April 12, 1973 (#96421), accepting the above applications for filing and establishing a cut-off date for future conflicting proposals IS HEREBY SET ASIDE pending final action with respect to the renewal application for station KOOD.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-504

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS BY ABC AND NBC FOR WAIVERS OF THE PRIME TIME ACCESS RULE IN CONNECTION WITH POSSIBLE SPORTS "RUNOVERS" DURING MAY AND JUNE 1973

MEMORANDUM OPINION AND ORDER

(Adopted May 9, 1973; Released May 14, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONERS ROBERT E. LEE AND JOHNSON DISSENTING, H. REX LEE, AND REID CONCURRING IN THE RESULT.

1. The Commission here considers requests for waiver of the prime time access rule (Section 73.658(k)) in connection with sports events involving possible "runovers" into prime time (or more than the allotted amount of prime time in the case of evening events), filed by National Broadcasting Company, Inc. (NBC) and American Broadcasting Companies, Inc. (ABC) on March 26 and May 1, 1973, respectively.[1] In the case of NBC, this present action deals only with events (all baseball games) occurring between now and June 30, 1973. We also consider an opposition to the NBC requests filed on April 12, 1973 by National Association of Independent Television Producers, Inc. (NAITP), and a reply to that opposition filed by NBC.

2. The events involved here are, for NBC, baseball games scheduled every Saturday afternoon starting May 12 (8 games), starting at either 2 or 4 p.m. E.T. depending on where the game is played, and six evening baseball games on Mondays starting May 21, commencing at 8 p.m. E.T. ABC's request is for three golf tournaments on Sundays, May 13, June 17 and June 24. For the first and third of these, coverage is scheduled from 4 to 6 p.m. E.T.; for the June 17 event, the U.S. Open, it is scheduled from 3:30 to 6:30 E.T.

3. Waivers in cases such as these—where coverage would normally be concluded before prime time and the waiver thus not needed at all, but where weather delays, overtime or "sudden death" play, etc., might make the event run longer—were contemplated in "footnote 35" of the May 1970 Report and Order adopting the prime-time access rule, 23 FCC 2d 382, 395. We have acted accordingly in several actions since the rule went into effect in October 1971, and in a recent action on reconsideration (which had been sought by NAITP) we affirmed this approach. See *Requests by ABC and NBC for Waivers of the Prime*

[1] ABC has withdrawn an earlier request filed April 2, 1973, covering three events in May, which was also opposed by NAITP.

*Time Access Rule*, FCC 73–450, adopted April 25 and released (as corrected) May 4, 1973.

4. NAITP's present opposition, along the same line as its petition for reconsideration considered in the last-mentioned decision, is essentially to the effect that consideration of waiver requests such as these, while the over-all prime-time-rule proceeding (Docket 19622) is pending and will be decided shortly, makes a mockery of our expressed policy of maintaining the status quo—which, asserts NAITP, means the prime-time rule *as written*.[2] NBC's opposition to NAITP urges essentially that grant of the waivers involved in its petition is in line with clearly established Commission policy, going back to "footnote 35", and thus is an integral part of the *status quo* which we seek to preserve pending the over-all decision. It is asserted that, moreover, this is not a substantial problem: of more than 650 hours of NBC sports events telecasting in the 15 months or so under the rule until the end of 1972, there were only 14 instances of runovers, totalling less than 2½ hours, or less than two minutes a week. It is claimed that, given the restrictions of the rule, this established policy is the only appropriate one, giving reasonable flexibility to present full coverage of sports events without causing severe dislocations in network and local schedules.

5. The matters covered in the NBC request are more or less of a routine nature, similar to numerous previous petitions for waiver. The circumstances of the ABC May 1 request are somewhat different. ABC has carried a number of weekend late-afternoon golf tournaments under waiver since the rule went into effect, but more recently has not sought waiver for such coverage, relying on its scheduling arrangement whereby in normal course the tournament would conclude before, and the telecast would terminate by, 6:30 p.m. E.T. It believed the half-hour leeway involved before the beginning of prime time to be sufficient to make any chance of "runover" highly remote. However, on April 29, in coverage of the Byron Nelson Golf Classic from Dallas, a runover did occur, resulting from a combination of a weather delay of nearly half an hour and a tie at the end of regulation play making a "sudden death" playoff necessary. According to its May 1 letter request, the weather delay (chiefly high wind) carried regular play to about 7 p.m. E.T., and the playoff then carried the telecast over to about 7:24, with conclusion of the telecast at 7:26. ABC followed with its regular three hours of evening programs from 8 to 11 E.T., and thus it and its affiliates in the Eastern and Central time zones (assuming they carried all of this material) were in violation of the prime time rule to the extent of 26 minutes.

6. ABC asks waiver *nunc pro tunc* to cover this situation, in light of the "highly unusual" circumstances and the general public-interest considerations advanced and considered in previous waiver requests by it and others. It also points out another circumstance (although one apparently arising independently rather than as a result of this run-

[2] We also consider herein a brief *"Petition for Stay and Continuing Opposition to Petitions for Waiver"* filed by NAITP on April 13, 1973, in effect asking the Commission not to consider waiver requests looking toward presentation of material after the likely date of the over-all decision in Docket 19622, or during the period before that date where "whole categories" of programs are involved—including in the second category sports runover waivers such as those involved here. It is asserted that all such requests involve general considerations—the type of matter the rule-making proceeding is designed to deal with—rather than "special circumstances".

over). This is that because of late developments in other scheduled sports events (NBA playoffs), it will present only 2½ hours of prime-time network fare on Thursday, May 3. Thus, for the week starting April 29, it will be within the "21 hours a week" standard sometimes urged as a basis for computing permissible network prime-time programming.

7. In order to avoid any future problems of this sort, the letter requests waiver, in case it should be necessary, in connection with the three golf tournaments mentioned above. In two of the three cases, coverage is scheduled from 4 to 6 p.m. E.T., which would give an hour's leeway rather than a half-hour before the beginning of prime time (an arrangement which, if it had been in effect, apparently would have prevented the "runover" in the April 29 situation). In the U.S. Open situation on June 17, coverage is expected to run until 6:30, the same as in the April 29 case; but, unlike that and most other golf tournaments, the U.S. Open is not decided on a "sudden death" basis the same day as the last regular round (the playoff, if necessary, takes place the next day). It is stated that no "runover" time would be used for post-game material.

DISCUSSION AND CONCLUSIONS

8. As far as the future is concerned, we conclude that waiver is warranted as requested by NBC and ABC, in case it should be necessary. The scheduling involved—three hours for NBC's baseball, and either an hour or a half-hour (without a playoff possibility) for ABC's golf tournaments—appears adequate to assure that the events will conclude before prime time in normal course or even with some delay (or, in the case of NBC's evening games, will consume no more than the allotted portion of prime time, and with any overrun falling outside of prime time anyhow in the Eastern and Central zones). We also hold that grant of waivers in these cases—contemplated by "footnote 35" of the Report and Order adopting the rule, and similar to several actions taken since—is within the concept of the *status quo* which we have expressed our intention to maintain during the interim period pending decision in the over-all rule-making proceeding. Our remarks in the recent decision mentioned concerning NAITP's petition for reconsideration of sports-event waiver grants (FCC 73–450, pars. 7–8) are equally apposite here and need not be repeated. Suffice it to say that, pending the over-all decision, life must go on.

9. The April 29 runover occurrence is something else. The Commission must and does expect its rules to be observed; and station licensees, and the networks both as station licensees and as the parties responsible for the scheduling of much TV material, have high degree of obligation to see that these regulations are observed. As noted in paragraph 5, above, a violation occurred in this case, without any request for waiver, on the part of the network and probably many individual stations affiliated with it, which was definitely more than insubstantial or technical. We reserve judgment as to what conclusions are to be attached to this; it is enough to say at present that any repetition will be a most serious matter.

10. It is true that we have granted waiver for events of this sort in the past, including golf tournaments. It may be that we would have done so here if the request had been made. However, in this connection it is to be noted that earlier this year, in February, an ABC golf telecast for which waiver had been granted involved a very considerable runover into prime time, actually more than an hour. In light of this, approval of a request for waiver on the basis of the April 29 arrangement would not have been automatic. We might have been reluctant to grant waiver for a golf tournament scheduled to run to 6:30, where there was a playoff possibility. We might have decided that in order to warrant waiver, a scheduled termination of 6 p.m. E.T. would be necessary, in situations where a playoff as well as weather delays are a possibility. In any event, we should have been given an opportunity to review the situation, and the failure to make such a request is not to be condoned. Waiver *nunc pro tunc* is out of the question. It may be that, for the future, it will be appropriate to require that scheduled coverage of any golf tournament be over by 6:30 p.m. E.T., and, where there is a possibility of a playoff the same day, that scheduled coverage should terminate by 6 p.m. E.T.

11. In view of the foregoing, IT IS ORDERED, That:

(1) Stations under common ownership or affiliated with the National Broadcasting Company (NBC) television network MAY CARRY TO CONCLUSION, through June 30, 1973, but not including any post-game material, baseball games starting on the network no later than about 4 p.m. E.T., without any of the time counting toward the three hours of network programs the same evening permissible under Section 73.658(k); and evening games starting at about 8 p.m., E.T.

(2) Stations under common ownership or affiliated with the American Broadcasting Company (ABC) television network MAY CARRY TO CONCLUSION, but not including any post-event material, golf matches televised on the ABC network on May 13, June 17 and June 24, 1973, without any of the time counting toward the three hours of network programs the same evening permissible under Section 73.658(k), provided the telecast of the tournament is scheduled to be concluded by 6 p.m. E.T. on May 13 and June 24, and by 6:30 p.m. E.T. on June 17;

(3) The request of American Broadcasting Companies, Inc. for waiver *nunc pro tunc* to cover the overrun after 7 p.m. which occurred on April 29, 1973, followed by the regular three hours of network programs, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–181

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Application of<br>GARY ACKER, BILLY WOLFE, DON BURRELL, CHARLES BURTON, AND PAUL L. BRADSHAW, D.B.A. QUEEN CITY BROADCASTING CO., SPRINGFIELD, MO.<br>For Construction Permit | Docket No. 19480<br>File No. BP–18321 |

ORDER

(Adopted May 10, 1973; Released May 11, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The Review Board having under consideration the petition for leave to amend application, filed on April 23, 1973, by Queen City Broadcasting Company;

2. IT APPEARING, That no objections to acceptance of the amendments have been filed within the time allowed therefor;

3. IT IS ORDERED, That the above petition for leave to amend application IS GRANTED and the amendment therein IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73D–10

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Application of<br>GARY ACKER, BILLY WOLFE, DON BURRELL, CHARLES BURTON, AND PAUL L. BRADSHAW, D.B.A. QUEEN CITY BROADCASTING CO., SPRINGFIELD, MO.<br>For Construction Permit | Docket No. 19480<br>File No. BP–18321 |

APPEARANCES

*Robert E. Levine, Esq., John H. Midlen, Sr., Esq.* and *James A. Gammon, Esq.*, on behalf of Gary Acker and Billy Wolfe, d/b as A–W Broadcasting Company; *Robert E. Levine Esq., John H. Midlen, Sr., Esq.* and *Leonard S. Joyce, Esq.*, on behalf of Charles Burton, Paul L. Bradshaw, Don Burrell, Jerry Carter and Joseph H. Pyle, d/b as Queen City Broadcasting Company; *John H. Midlen, Sr., Esq.*, and *Robert E. Levine, Esq.*, on behalf of Gary Acker, Billy Wolfe, Charles Burton, Paul L. Bradshaw and Don Burrell, d/b as Queen City Broadcasting Company; *Leo Resnick, Esq.* and *Simon Tucker, Esq.*, on behalf of William B. Neal; and *Jay L. Witkin, Esq.* and *John T. Kelly, Esq.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JAY A. KYLE

(Issued March 5, 1973; Released Effective May 1, 1973, Pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. This proceeding involves the application of Queen City Broadcasting Company for a construction permit to build a standard broadcast station (1550 kHz, 500 w, Daw) in Springfield, Missouri.

2. By Memorandum Opinion and Order FCC 72–282, released March 29, 1972, the Commission designated for hearing the mutually exclusive applications of (1) Gary Acker and Billy Wolfe d/b as A–W Broadcasting Company, Springfield, Missouri (Docket No. 19480); (2) Charles Burton, Paul L. Bradshaw, Don Burrell, Jerry Carter, and Joseph H. Pyle, d/b as Queen City Broadcasting Company, Springfield, Missouri (Docket No. 19481); and (3) William B. Neal (KQYX), Joplin, Missouri (Docket No. 19482), and specified ten issues.

3. By Memorandum Opinion and Order, FCC 72M–1289, released October 17, 1972, the Presiding Judge formally granted a Joint Petition for Approval of Agreement, filed by the two Springfield applicants, and dismissed the application of Queen City Broadcasting Com-

pany (Docket No. 19481).[1] Under the aforementioned agreement, a new partnership consisting of Gary Acker (25%), Billy Wolfe (25%), Don Burrell (16⅔%), Charles Burton (16⅔%), and Paul L. Bradshaw (16⅔%), was established as the surviving Springfield applicant. The new partnership elected to prosecute the application in Docket No. 19480 under the name of Queen City Broadcasting Company ("Queen City").

4. The parties have agreed, and the Presiding Judge so ruled, that dismissal of the application in Docket No. 19481 and severance of the Neal application [1] have mooted all issues designated by the Commission except Issues 3 (Suburban), 4 (financial), and 5 (Rule 1.65), which issues read as follows:

(3) To determine the efforts made by A–W Broadcasting Company and Queen City Broadcasting Company to ascertain the community needs and interests of the area to be served and the means by which the applicants propose to meet those needs and interests.

(4) To determine with respect to the application of A–W Broadcasting Company:

(a) The basis for the estimate of the first-year's operating expense and whether such estimate is reasonable;

(b) Whether the applicant has sufficient liquid assets to finance construction and operation of the proposed station; and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b), above, the applicant is financially qualified.

(5) To determine whether A–W Broadcasting Company has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial and significant changes as required by Section 1.65, and, if not, the effect of such noncompliance on its basic and/or comparative qualifications to be a Commission licensee.

Evidentiary hearings on these issues were held on October 31 and November 1, 1972. The hearing record was closed on November 10, 1972, reopened November 20, 1972 to receive an exhibit and closed on the same day by an Order of the Administrative Law Judge (FCC 72M–1439), released November 21, 1972. The Administrative Law Judge, by an Order released January 26, 1973, pursuant to a petition of the applicant, reopened the record to receive an amendment to the application to reflect that Gary Acker no longer has any connection with or interest in Station KGOY(FM). The record was then again closed by said Order. Proposed Findings of Fact and Conclusions of Law were filed on December 1, 1972 on behalf of both Queen City and the Commission's Broadcast Bureau.

## FINDINGS OF FACT

5. Queen City seeks authority to construct a new Class II standard broadcast station at Springfield, Missouri, daytime only, on 1550 kHz with 500 watts power. Springfield is a city of 120,096 persons according to the 1970 U.S. Census. It is situated in Greene County, Missouri that has a population of 152,929 which includes, besides Springfield,

[1] By Order, FCC 72M–1303, released October 18, 1972, the Presiding Judge formally granted the petition of William B. Neal (KQYX) for severance of his application from consolidated consideration with the application of Queen City Broadcasting Company (Docket No. 19480). The evidentiary hearing pertaining to the Neal application has been held, the record closed, and an Initial Decision (FCC 72D–72) granting the Neal application was released November 3, 1972.

the cities of Ash Grove, Walnut Grove, Republic, Strafford, Fair Grove and Willard, all in Missouri. Springfield is the county seat of Greene County. The 1970 U.S. Census population breakdown for Springfield and Greene County is as follows:

| Area | Total | White | Negro | Other |
|---|---|---|---|---|
| Springfield | 120,096 | 117,301 | 2,379 (1.98%) | 416 (.34%) |
| Greene County | 152,929 | 150,034 | 2,421 (1.58%) | 474 (.30%) |

6. Springfield is governed by a Home Rule Charter with a Council-Manager form of government. The nine council members appoint the City Manager, and the Mayor is elected by the Council from its membership for a 2-year term to serve as the ceremonial head of government. The County Court is the presiding body of Greene County consisting of a presiding judge who serves a 4-year term and two associate judges who serve 2-year terms. The Court is responsible for general policy decisions and the administration of the Greene County government.

7. The Springfield public school system consisting of 43 elementary, 8 junior high and 5 senior high schools serves over 26,000 students with a pupil-teacher ratio of 1 to 27 at the elementary and 1 to 13 at the secondary level. A vocational-technical area school serves approximately 650 daytime students and on an annual basis 3,200 adults. Area colleges include Baptist Bible College, Central Bible College, Drury College, Evangel College, School of the Ozarks, Southwest Missouri State College and the University of Missouri at Rolla. Additionally, there are business, engineering, trade and technical schools located in Springfield.

8. Springfield has over 150 churches representing all religious denominations. Four hospitals serve Springfield with combined capacities for 1500 patients. There are over 400 civic, business, patriotic and social clubs in Springfield including all major organizations. Agricultural, retail trade, light manufacturing, wholesale distribution and tourism are the major occupational fields.

9. The applicant's five principals, namely, Acker, Wolfe, Burrell, Burton and Bradshaw, in an effort to ascertain the needs and interests of the area to be served by their proposed station had personal consultations with 150 community leaders, 88 of whom represented the city of Springfield and the remaining 13 in Greene County. Additionally, community leaders were interviewed in 19 smaller communities in the service area totaling 49 persons. Included in the community leaders' survey were men and women, representatives of State, city and county governments, the judiciary, religion, law enforcement, labor, the military, business, the professions, education, health, youth, agriculture, transportation, the news media, leaders of the Black community, including representatives from civic, fraternal and eleemosynary institutions.

10. The first survey of the general public conducted in October, November and December, 1971 by the original Queen City partners

and by Acker and Wolfe as partners of A–W Broadcasting Company consisted largely of interviewing people they met during a normal working day and in the evening social hours. The second survey of the general public conducted in August, 1972, after the merger, was also conducted by the partners as well as the wives of Acker and Wolfe, asking questions of people contacted during a working day in various parts of the city as well as at social affairs. Visits were also made to the outlying communities around Springfield where residents were sought out for interviews.

11. Combined with the earlier surveys, the overall total of Springfield residents interviewed was 186 and the total of residents of seventeen smaller communities was 72 for a total of 258. The general public survey included interviews with businessmen and businesswomen, teachers, government employees, college and high school students, housewives, office workers, ministers, laborers, farmers and livestock owners, retirees and members of the Black community. Organizations represented by the members of the general public contacted included YWCA, YMCA, Chambers of Commerce, Girl Scouts, Boy Scouts, Teachers associations, P.T.A., Senior Citizens, Red Cross, 4–H, Elks, Shrine, Kiwanis, Masons, Lions, Garden Club, American Legion, Young Republicans, Young Springfieldians, College Union Board, Metro Club, Exchange Club, Indian Guides, and numerous churches and church organizations.

12. From the evidence, the personal consultations held with community leaders throughout the service area of the proposed station elicited the following needs and problems in the order of times specified:

| Problem or need: | *Times mentioned* |
|---|---|
| High crime rate and corresponding need for enlarged and improved police department and stricter laws, judicial reform | 54 |
| Drug abuse and treatment; alcoholism and related youth problems | 24 |
| Solid waste disposal and water system and storm sewers | 22 |
| Unemployment—job opportunities for youth and minority groups—higher wage scales—poverty | 11 |
| Civic center | 10 |
| Recreational facilities—youth | 10 |
| Public apathy | 9 |
| Inadequate parking facilities | 9 |
| High cost of living—high tax rate | 9 |
| Improved housing facilities | 9 |
| New courthouse and county jail | 7 |
| Government funding | 7 |
| Pollution and littering | 6 |
| Improved streets and roads | 6 |
| Lack of communication between races and generations | 6 |
| Combined city-council government and departments | 5 |
| Additional industries | 5 |
| Traffic control | 4 |
| Urban renewal | 3 |
| Airport improvements | 3 |
| Communication and understanding between unions and employers | 2 |

13. The interviews with the members of the general public throughout the service area disclosed, in general, concern for the same problems and needs specified by the community leaders as follows:

| Problem or need: | *Times mentioned* |
|---|---|
| High crime rate and corresponding need for enlarged and improved police department and stricter enforcement of law | 90 |
| Sidewalk and street improvements | 31 |
| Civic and community center | 23 |
| Traffic control | 21 |
| Solid waste disposal and water system and storm sewers | 21 |
| City sales tax to pay salaries of city employees (police and firemen) | 18 |
| Unemployment, additional industries, poverty and higher wages | 17 |
| Drug abuse and related youth problems | 14 |
| Recreational facilities (youth) city park | 13 |
| High taxation and cost of living | 10 |
| Improved school facilities | 10 |
| Welfare abuse | 7 |
| Improved housing facilities | 7 |
| Improved fire protection | 7 |
| Economy in government | 6 |
| Care for aged—nursing homes | 5 |
| Additional industries and job opportunities | 5 |
| Bond issues | 5 |
| Pollution | 5 |
| Increased city revenues | 4 |
| Improved health facilities | 4 |
| Improved highways | 4 |
| Public transportation | 4 |
| Parking facilities | 4 |
| Housing for the elderly | 3 |
| New shopping centers | 3 |
| Welfare reform | 3 |
| New county jail | 3 |
| Improved airport facilities | 2 |
| Improved hospital facilities | 2 |
| School drop-outs | 2 |

Several other problems and needs were specified only once by members of the general public.

14. The smaller communities, all in Missouri, included Ozark, Billings, Clever, Strafford, Rogersville, Marionville, Fair Grove, Nixa, Brighton, Fordlan, Morrisville, Bois D'Arc, Marshfield, Ash Grove, Sparta, Republic, Walnut Grove and Willard. The results of the survey in these smaller communities were generally the same as from the surveys reflected above.

15. The applicant proposes a variety of programs in an endeavor to meet the community needs and problems as ascertained through the various surveys. The partners of Queen City are business and professional people of the community and have knowledge of local needs and problems. Two of the partners of Queen City have had broadcast experience. After reviewing and evaluating the problems and needs specified during the surveys and based upon their personal knowledge of the area, the applicant has proposed a program format specifically designed to meet the problems and needs of the community.

16. The specific programming proposed is as follows:

(a) *Know Your Government.* This weekly 30-minute program will be broadcast from 2:30 p.m. to 3:00 p.m. on Sunday and will afford officials of city, county, State and Federal governments the opportunity to discuss such prob-

lems and needs as the rising crime rate, the need for enlarged and improved law enforcement agencies; judicial reform, the need for a new Courthouse and county jail, improvements to the airport, a Civic Center and parking facilities. This program will also afford these government officials an opportunity to discuss internal problems and fund raising.

(b) *Teen Time.* This weekly 30-minute program will be broadcast from 4:00 p.m. to 4:30 p.m. on Saturday which will feature youth of the area discussing such youth-related problems as drug abuse, alcoholism, unemployment and additional recreational facilities. The views of area youth on national and international problems affecting the age group will also be sought.

(c) *Speak Out.* This weekly one-hour program will be broadcast from 1:00 p.m. to 2:00 p.m. on Wednesday and will seek out and air the views of the general public and representatives of area civic, fraternal, ethnic and eleemosynary organizations on timely problems, projects and needs in the field of economics, education, medicine, religion, government, agriculture, etc.

(d) *Job Opportunities.* With the cooperation of the State Employment Office, a daily program will feature area job opportunities for the unemployed. The program will be broadcast from 12:45 p.m. to 12:48 p.m.

(e) *College Hour.* One hour of time will be offered to the five Springfield Colleges on a weekly rotating basis during the school year for the presentation of debates, plays, speeches or musical programs together with current activities and projects of the particular college. It is planned to broadcast this program from 9:00 a.m. to 10:00 a.m. each Saturday.

(f) *Sunday Sing.* A live weekly program will be presented each Sunday from 3:00 p.m. to 4:00 p.m. to encourage local talent to present sacred music.

(g) *Your Minister.* A daily fifteen-minute program to be broadcast from 11:00 a.m. to 11:15 a.m. featuring on a rotating basis area ministers of all faiths.

(h) *Better Health.* Area doctors will discuss health tips on this daily five-minute program to be broadcast from 12:00 p.m. to 12:05 p.m.

(i) *Church Bulletin Board.* A twice daily program featuring news for all area churches to be broadcast at 9:00 a.m. and at 4:00 p.m.

(j) *Mister Farmer and Gardener.* A daily five-minute program presented by the County Agricultural Department and other sources, featuring news of interest to the agricultural community. This program is to be broadcast from 6:30 a.m. to 6:35 a.m.

(k) *Helping Hand.* A daily fifteen-minute program featuring thoughts, articles and services for sale or exchange to be broadcast from 8:45 a.m. to 9:00 a.m.

(l) *Mama's Kitchens.* A daily program featuring the prize-winning recipe of the day to be broadcast at 3:15 p.m.

17. The applicant found a great need for religious broadcasting in the Springfield area on the standard broadcast band. National statistics show that 64.4%, or 123,307,477 people are affiliated with or are active members of some religious group. A survey conducted by Southwest Missouri State College revealed the percentage of church-affiliated people in the Springfield area was 86.8%, which is much above the national average. Southwestern Missouri is a religious-minded area having two large Bible Colleges in Springfield, Baptist Bible College and Central Bible College. The other three area colleges, Drury, Southwest Missouri State, and Evangel offer courses in theology. The personnel, students and their parents of the various colleges will be served by the proposed station. A survey of local programming reveals that the average of religious broadcasting in Springfield is approximately 6%, however, a major portion of this is on Sunday, leaving scarcely none for weekday broadcasting. In order to more adequately meet this segment of the population's tastes and needs, the applicant proposes, in addition to the above-described programming, further daily religious programs.

18. Queen City's estimates for construction and operating costs, as well as its plan of financing, have been completely revised as the result

of acceptance of amendments proffered on August 4 and October 30, 1972. The Commission specified an inquiry into the reasonableness of Queen City's estimate of $16,500 for its first year operating expenses because, *inter alia*, that estimate appeared low in view of Queen City's proposal to employ six persons. In its exhibits, which are based on one of the aforementioned amendments, Queen City has increased its estimate to $60,000. This action, viewed in light of testimony adduced at the hearing sessions pertaining to the basis and reasonableness of the revised estimate, should eliminate the source of the Commission's concern with respect to the reasonableness of Queen City's estimate of its first year operating costs.

19. In its exhibits, Queen City estimates first year construction and operation costs to be $95,886.10. In order to meet that estimate, it relies upon deferred credit from an equipment manufacturer and upon loans from each of its five partners and from a banking institution, as follows:

| | | |
|---|---|---|
| Banking institution | | $32, 200. 00 |
| Net deferred credit (equipment) | | 14, 328. 86 |
| Loan commitments of Partners: | | |
| Gary Acker | $25, 000. 00 | |
| Billy Wolfe | 10, 000. 00 | |
| Don Burrell | 6, 500. 00 | |
| Charles Burton | 6, 500. 00 | |
| Paul L. Bradshaw | 7, 000. 00 | 55, 000. 00 |
| Total | | $101, 528. 86 |

The bank loan is supported by a letter of commitment which requires the signature of each partner of Queen City but no collateral. The "Net Deferred Credit" is supported by a letter of commitment from an equipment manufacturer. Finally, each partner's loan is supported by a balance sheet of the partner, by a letter of commitment from a bank to each partner in the amount of his loan, which reflects that no collateral will be required, and by a letter of commitment from each partner to Queen City.

20. By an Order (17554) released June 3, 1968, the Commission granted the application (BTC–5592) of Gary Acker to acquire control of FM Station KGOY in Bethany, Oklahoma. At the time of the Commission's action, the call letters of the station were "KNBQ." This transfer was consummated on June 9, 1968.

21. On July 19, 1968, Acker and Wolfe filed the application of A–W Broadcasting Company. That application reported the ownership interest of Acker in Station KGOY in Bethany, Oklahoma. On January 11, 1973 Queen City filed a petition for leave to amend its application. The purpose of the amendment was to reflect that Acker had disposed of his interest in Station KGOY–FM by assignment of the station license and therefore he no longer had any connection with or interest in KGOY–FM. By an Order released January 26, 1973 (FCC 73M–111), the Administrative Law Judge reopened the record, accepted the tendered amendment and again closed the record.

22. On September 9, 1968, Gary L. Acker and Albert L. Crain d/b as Millington Broadcasters, filed an application (BAL–6468) to acquire control of AM Station WTNN in Millington, Tennessee. At the time the application was filed, the call letters of the station were

"WGMM." That application reported the ownership interests of Acker in Station KGOY.

23. The Commission specified a Section 1.65 issue against the application of A–W Broadcasting Company because Acker had failed to amend that application to show the application for (September 9, 1968), grant of (November 20, 1968), and consummation of (December 1, 1968) transfer of control of AM Station WTNN, Millington, Tennessee. Acker amended his application to reflect these facts on August 4, 1972. However, on December 15, 1971, and prior to designation for hearing of the A–W Broadcasting Company application, Acker filed a balance sheet with an amendment to the A–W application which disclosed his interest in Station WTNN.

24. The applications by Acker for a 50% ownership interest and subsequently a 100% ownership interest in Station WTNN, Millington, Tennessee filed on September 3, 1968 and June 5, 1969, respectively listed the 50% ownership interest of Acker in A–W Broadcasting Company. The application to acquire Station WTNN was prepared and handled by Acker without communications counsel. The A–W Broadcasting Company application and all related non-engineering material were prepared by Acker and Wolfe without communications counsel until March, 1972. Also, Acker had earlier handled without communications counsel the application for acquisition of Station KNBQ, now KGOY, in Bethany, Oklahoma.

25. Neither Acker nor Wolfe knew the specific provisions of Section 1.65 of the Commission's Rules. Acker had only a general knowledge of the obligation to keep the Commission informed of changes in ownership. He testified that he did not learn of the specific provisions of Section 1.65 until after the applications were designated for hearing. Acker also testified that he did not know that he was required to go back and amend a prior application to reflect a change which occurred subsequent to the filing of an application. The finding is here made that the failure to amend the A–W applicaiton pursuant to Section 1.65 was not intentional nor intended to conceal the fact as the Acker balance sheet filed with an amendment to the application on December 15, 1971 reflected Acker's interest in Station WTNN. Acker testified that he believed the reference to the A–W Broadcasting Company ownership interest in the two WTNN assignment applications together with the balance sheet showing the WTNN ownership interest in the A–W application satisfied the Commission's reporting requirements. The Commission was advised of the WTNN ownership interest of Acker with the filing of ownership reports.

## CONCLUSIONS

1. The applicant, a partnership, d/b as Queen City Broadcasting Company, here seeks a construction permit to build a new standard broadcast station (1550 kHz, 500 watts, day) in Springfield, Missouri.

2. One of the issues directed to Queen City is a so-called financial issue. After the order of designation, Queen City substantially amended its application to increase its first year operating expenses from $16,500 to $60,000. In its exhibits tendered at the evidentiary hearing, Queen City estimated its first year construction and operating

costs as $95,886. As against this, the applicant relies on deferred credit from an equipment manufacturer besides loans from its five partners and from a banking institution. From these sources in the aggregate Queen City will realize $101,528.86.

3. From the evidence adduced at the evidentiary hearing, it is determined that the estimates of the first year operating costs are reasonable and that the applicant has sufficient and adequate assets to finance construction and operation of its proposed station. Therefore, the finding here is reached that Queen City has met Issue No. 4 and is financially qualified to construct and operate its proposed station.

4. Queen City has failed to comply with Section 1.65 of the Commission's Rules in that it did not amend its application within 30 days to reflect the ownership interest of Gary Acker in the Millington, Tennessee application (BAL–6468). Acker claims that he was unaware of the need to amend the A–W application until designation of the A–W application for hearing. The Commission specified a Section 1.65 issue in this proceeding because Acker, a partner, had failed to amend the Millington, Tennessee application just referred to above. Acker professed ignorance as to the requirements of Section 1.65 which plea of ignorance is not justifiable and should not possibly be condoned. It is the duty of applicants with applications pending before the Commission to keep their applications up to date in order that the Commission may evaluate only the most current and complete information. This obligation particularly is pertinent when a principal of one applicant acquires or applies for other broadcast facilities because each application must be studied in view of such Commission policies as those relating to financial qualifications, concentration of control and diversity of ownership of the media.

5. The Commission stated in *Channel 41, Inc.*, 24 FCC 2d 603 (1970):

> *We do not take lightly a failure to amend an application to indicate new broadcast interests.* We note, however, that the omitted information in Channel 41, Inc.'s application was on file in another application, indicating that there was no motive for concealment; that the omitted information does not pertain to other aspects of the applicant's qualifications, financial, for example; and that we have only this one isolated instance. We believe, therefore, that in these circumstances no further inquiry or sanction is required.[1] (Emphasis supplied.)

It must be said though that Acker did disclose in subsequently filed applications complete information regarding other broadcast interests as of the date of filing of such applications. In a balance sheet filed with the A–W application prior to designation for hearing Acker reported his ownership interest in Station WTNN, Millington, Tennessee. It is obvious that Acker entertained no motives to conceal information from the Commission and the conclusion is here reached that Queen City should not be disqualified for its failure to comply with Section 1.65 in the instant proceeding.

6. As it relates to Issue No. 3, the evidence is replete that Queen City has fully met this issue which pertains to the ascertainment of community needs and interests of the area to be served along with substantial evidence of the means of making that determination. Origi-

[1] See also *The Big Chief*, 29 FCC 2d 154 (Rev. Bd., 1971).

nally, the applicant's five partners, in an effort to ascertain the needs and interests of the area, had personal consultations with 150 community leaders, 88 of whom represented the city of Springfield and 13 in Greene County, Missouri. Besides these, leaders were interviewed in 19 smaller communities totaling 49 persons. Included in the community survey were men and women representatives of State, county, and city governments, the judiciary, religion, law enforcement, labor, the military, business, the professions, education, health, youth, agriculture, transportation, the news media, leaders of the Black community, including representatives from civic, fraternal and eleemosynary institutions. Later surveys were made which brought the total of Springfield residents interviewed to 186 and the total of residents of the smaller outlying communities was 72 for an ultimate total of 258. All in all, there were three surveys made by the partners during the years 1971 and 1972. The record in this proceeding shows that these surveys were comprehensive and well determinative in an effort by the partners to make an ascertainment of the communities' needs and interests. The conclusion is here reached that the applicant has well met the burden of proof as it relates to Issue No. 3.

7. In view of the foregoing findings of fact and conclusions of law and upon careful evaluation of the entire record in this proceeding, it is concluded that a grant of the application of Gary Acker, Billy Wolfe, Don Burrell, Charles Burton and Paul L. Bradshaw d/b as Queen City Broadcasting Company for a construction permit to build a standard broadcast station (1550 kHz, 500 watts, day) in Springfield, Missouri will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by the applicant or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Commission's Rules, the application of Gary Acker, Billy Wolfe, Don Burrell, Charles Burton and Paul L. Bradshaw d/b as Queen City Broadcasting Company for a construction permit to build a standard broadcast station (1550 kHz, 500 watts, day) in Springfield, Missouri IS GRANTED, subject to the following condition:

**Permittee shall assume responsibility for the installation and adjustment of filter circuits or other equipment in the antenna system of the proposed operation and any existing station which may be necessary to prevent adverse effects due to internal cross-modulation and reradiation.**

FEDERAL COMMUNICATIONS COMMISSION,
JAY A. KYLE, *Administrative Law Judge.*

F.C.C. 73-393

**BEFORE THE**

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE NOTICE OF APPARENT LIABILITY FOR FORFEITURE OF RADIO CLEVELAND, INC. (STATION WCLD), CLEVELAND, MISS.

APRIL 11, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
RADIO CLEVELAND, INC.,
RADIO STATION WCLD,
*1101 South Davis,*
*Cleveland, Miss. 38732*

GENTLEMEN: This letter constitutes a Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

An inspection of the operating logs of Station WCLD on May 9, 1972 indicated that the one half hour readings required by Section 73.113 of the Commission's Rules were not entered in the operating log and no operator was listed in the operating logs as being on duty in charge of the transmitter during the period 11:30 a.m. to 1:30 p.m. on April 18, 21, 22, 24, 27, 28, 29, 1972 and May 1, 3, 4, and 9, 1972.

You replied to the Notice of Violation for these citations by stating:

> At the time of inspection, the operator on duty had not yet received his radiotelephone third class license endorsed for broadcast. Although he had taken the examination the previous week in Little Rock, Arkansas, and had been informed that he had passed. Customarily for short intervals when it is necessary for the on the air announcer to be someone who does not hold a radiotelephone third class broadcast endorsed license, arrangements are made with an operator who, due to his production shift or other duties is also on the premises, to make the required transmitter readings. In this instance, it was only recently discovered that the operator did not have the required license, and, due to an oversight, no one was assigned the responsibility of operating the transmitter. This oversight was corrected on May 10, 1972, and, will be handled in the same manner in the future.[1]
>
> The transmitter readings that were not logged were during those times that the operator referred to in paragraph three of this letter was on duty. This operator normally serves as an announcer two hours a day Monday through Friday, and three hours on Saturday mornings. His primary responsibility is the gathering, editing and writing of local news stories. He had taken and passed the examination for his radiotelephone third class license with broadcast endorsement the week prior to WCLD's inspection. The third class "license" he stated that he held when he was hired was found to be a restricted permit of the type required by the FCC before the advent of the third class radiotelephone operator's requirement. Since that time he held no position which required that he operate a transmitter. He states that he knew of no such third class requirement and we believe him to be sincere in his representation. It was during a check of the expiration dates on the licenses of WCLD's operators in March that his error was discovered. He took the examination at the earliest possible date. It was due to an oversight on the part of WCLD's manager that the required readings were not made. WCLD recognized its responsibility to

[1] This paragraph is paragraph three of your reply.

operate the transmitter in the manner prescribed by the Federal Communications Commission and will, in the future, if the need arises, follow the procedure outlined in paragraph three of this letter to insure that the requirements of the FCC rules are met. In addition, WCLD's chief engineer is now required to make daily inspections of the operating log to see that our operators are following the correct procedures.

It appears that you failed to have a qualified operator in charge of the transmitter on the dates and at times indicated hereinabove, in violation of Section 73.93(b) of the Commission's Rules.

We have considered your reply and the circumstances of this case and have determined that, pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended, you have incurred an apparent liability for forfeiture in the amount of five hundred dollars ($500) for violation of Section 73.93(b) of the Commission's Rules. This proceeding is confined to those violations which occurred within one year prior to the date of the issuance of this Notice of Apparent Liability.

You are hereby notified that you have the opportunity to file with the Commission, within thirty (30) days of the date of the receipt of this Notice, a statement in writing as to why you should not be held liable, or, if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations heretofore made by the Commission, any justification for the violations involved, and any other information which you may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of any such reply, the Commission will determine whether the facts set forth therein are sufficient to relieve you of liability, or to justify either reduction or remission of the amount of liability. If it is unable to find that you should be relieved of liability, the Commission will issue an Order of Forfeiture and forfeiture will be payable to the Treasurer of the United States.

If you do not file, within thirty (30) days of the date of receipt of this Notice, either a statement of non-liability or a statement setting forth facts and reasons why the forfeiture should be of a lesser amount, the Commission will enter an Order of Forfeiture in the amount of five hundred dollars ($500).

If you do not wish to file a statement which denies liability and, in addition, you do not wish to await the issuance of an Order, you may, within thirty (30) days of the date of the receipt of this letter, make payment of the forfeiture by mailing to the Commission a check, or similar instrument, in the amount of five hundred dollars ($500) drawn payable to the Treasurer of the United States.

Commissioner Robert E. Lee absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73R–179

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In Re Applications of | |
| RESORT BROADCASTING CO., INC., LEISURE CITY, FLA. | Docket No. 18956<br>File No. BPH–6545 |
| FINE ARTS BROADCASTING CO., GOULDS, FLA. | Docket No. 18958 |
| For Construction Permits | File No. BPH–6617 |

ORDER

(Adopted May 4, 1973; Released May 7, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The Review Board having under consideration the transcript of the oral argument in the above-captioned proceeding held on March 29, 1973, and the motion to correct transcript filed jointly by Resort Broadcasting Co., Inc., and Fine Arts Broadcasting Co., on April 24, 1973;

2. IT APPEARING, That no opposition has been filed to this motion; that the time for filing any such opposition has expired; and that the corrections set forth in the motion are proper and should be made;

3. IT IS ORDERED, That the subject motion to correct transcript IS GRANTED and that the transcript of oral argument in this proceeding held March 29, 1973, IS CORRECTED in accordance with such subject motion.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–180

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In Re Applications of | |
| RKO GENERAL, INC. (WNAC–TV), BOSTON, MASS. | Docket No. 18759<br>File No. BRCT–63 |
| For Renewal of Broadcast License | |
| COMMUNITY BROADCASTING OF BOSTON, INC., BOSTON, MASS. | Docket No. 18760<br>File No. BPCT–4198 |
| THE DUDLEY STATION CORP., BOSTON, MASS. | Docket No. 18761<br>File No. BPCT–4277 |
| For Construction Permit for New Television Broadcast Station | |

MEMORANDUM OPINION AND ORDER

(Adopted May 8, 1973; Released May 11, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Before the Review Board for consideration is a petition to enlarge issues, filed January 3, 1973, by Community Broadcasting of Boston, Inc.[1] (Community) directed against the application of RKO General, Inc. (RKO). Community seeks addition of the following issues against RKO: (a) Section 1.514 and 1.65 issues with respect to RKO's CATV and microwave interests; (b) a cross-interest issue; (c) an issue to determine whether RKO intentionally concealed CATV and microwave interests, or, negligently failed to report these interests; and (d) a conclusory issue to determine whether RKO possesses the requisite qualifications to be a licensee or should receive comparative demerits in this proceeding.

THE DUDLEY PLEADING

2. On January 18, 1973, Dudley filed a pleading entitled "Comments of The Dudley Station Corporation in Support of Community's Petition to Enlarge Issues Against RKO General, Inc." In addition to commenting on the issues requested by Community, Dudley also requests that the Board expand the scope of the Section 1.514 and Section 1.65 issues requested by Community to include, *inter alia*, an inquiry into RKO's alleged failure to report significant changes in its management alignment and RKO's policies and practices with respect to ascertaining and disclosing all pertinent media interests. Dudley's

[1] Also before the Board for consideration are: (a) opposition by RKO, filed on January 17, 1973; (b) Broadcast Bureau's comments, filed on January 17, 1973; (c) comments of The Dudley Station Corporation (Dudley), filed on January 18, 1973; (d) reply by Community, filed on January 29, 1973; (e) motion to strike or opposition to (c), filed by RKO on January 31, 1973; (f) motion for leave to file (e) by RKO, filed on January 31, 1973; (g) opposition to (e) by Dudley, filed on February 12, 1973; and (h) comments on (f) by Dudley, filed on February 12, 1973.

pleading goes far beyond the scope of the 1.514 and 1.65 issues requested by Community.[2] In effect, Dudley is seeking to enlarge the issues by means of a pleading responsive to a petition to enlarge issues. Such a procedure is unauthorized and cannot be accepted. Since Dudley is a party to this proceeding, it has a right to file a responsive pleading to Community's motion to enlarge issues. However, the Board will limit its consideration of Dudley's pleading to the matters raised by Community's motion to enlarge issues. The remainder of Dudley's comments, as well as the various pleadings filed by RKO and Dudley responsive to these comments, will be dismissed.

SECTION 1.514 AND 1.65 ISSUES

3. In support of these requested issues, Community alleges that RKO listed its business and media interests, including a list of cities served by companies operating CATV systems in which RKO had an interest of 25% or more, as Exhibit D to its renewal application for WNAC–TV, filed on December 30, 1968. Community further alleges that RKO did not amend its application for WNAC–TV to add or delete any CATV or microwave interests until December 14, 1972, when RKO filed a petition for leave to amend.[3] According to Community, an examination of Exhibit D to WNAC–TV's renewal application and the amendment filed on December 14, 1972, reveals that numerous CATV and microwave acquisitions were not reported to the Commission until December 14, 1972. Since RKO did not supply the dates on which it acquired these interests, petitioner states, it cannot ascertain whether RKO failed to report these interests in its application or failed to amend its application to incorporate these additional CATV and microwave interests. Accordingly, Community requests that the Board add both Rule 1.514 and Rule 1.65 issues to the instant proceeding. Both the Broadcast Bureau and Dudley support addition of these requested issues.

4. RKO, in opposition, argues that Community's motion to enlarge issues is untimely; that Community has not shown good cause since it was in a position prior to January 3, 1973, to ascertain RKO's CATV and microwave interests from the trade press and various prospectuses filed with the S.E.C.; and that the public interest would not be served by adding the requested issues because RKO's CATV and microwave interests have no bearing on the diversification criterion or under any other decisional standard. RKO alleges that the omissions were inadvertent and innocent, as evidenced by the fact that it supplied this information in renewal applications for other broadcast stations. Finally, RKO argues that it did not report franchises which were not yet operating CATV systems because it was not aware that such franchises should be reported until the Board's recent opinion in *WTAR Radio–TV Corp.*, 37 FCC 2d 480, 25 RR 2d 463, which was released in September, 1972.

[2] Community's requests are directed solely to RKO's CATV and microwave acquisitions.

[3] The Presiding Judge ordered RKO to make a complete showing of all of its media interests. RKO then offered Exhibit 77, "The Media Interests of RKO General, Inc.", into evidence on October 31, 1972. The exhibit showed the CATV and microwave interests of RKO. RKO then filed a petition for leave to amend on December 14, 1972. The Judge, however, did not require RKO to provide the dates when it acquired its various CATV and microwave interests.

5. Although the Board agrees with RKO's arguments regarding the untimeliness and lack of good cause for the late filing of Community's motion to enlarge issues, the Board nevertheless believes that the public interest warrants consideration of the instant motion on its merits. *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 8 RR 2d 611 (1966). An examination of Exhibit D to WNAC–TV's renewal application, Hearing Exhibit 77, and Attachments 2 and 3 [4] to RKO's opposition to Community's motion to enlarge issues discloses that RKO apparently failed to report at least one CATV operation and numerous CATV franchises in its renewal application for WNAC–TV. For example, on page 2 of Attachment 2, Cablecom lists Odessa, Texas, as a city served by a partly completed CATV system in which it had a 26% interest as of January 15, 1969.[5] The Odessa system is not listed in Exhibit D of WNAC–TV's renewal application, filed on December 30, 1968. Although exact dates are not before us, it appears that RKO was either operating part of the Odessa system, constructing it, or, at the very least, had obtained a franchise for Odessa when it filed the WNAC–TV renewal application. In addition, on page 9 of Attachment 2, Cablecom states that it had obtained franchises for CATV systems for cities in Colorado, Tennessee, and California as of January 15, 1969, 15 days after RKO filed the WNAC–TV renewal application. RKO did not list these franchises in the WNAC–TV renewal application. Further, an examination of the same material discloses also that RKO apparently failed to report numerous CATV operations, CATV franchises and microwave interests acquired after RKO filed the WNAC–TV renewal application. Specifically, it appears that RKO did not report operating CATV systems and CATV franchises for numerous cities in Missouri, California, Colorado, Texas, Florida and Kansas, as well as microwave interests in Oklahoma, Kansas and Texas, all of which were acquired after RKO filed the WNAC–TV renewal application.

6. In light of the foregoing, the Board believes that Community has raised substantial questions concerning RKO's compliance with Sections 1.514 and 1.65 of the Commission's Rules. A renewal applicant must report the ownership of operating CATV systems, CATV franchises and the names and locations of each system in the renewal application, FCC Form 303. *TV Signal Company of Aberdeen*, 23 FCC 2d 603, 19 RR 2d 298 (1970); *WTAR Radio-TV Corp.*, *supra*. In the latter case, the Board noted that ownership of CATV systems could be relevant to the questions of concentration of control, diversification and financial qualifications. Since it appears that RKO may have failed to list all of its CATV interests—both operating systems and franchises—in its renewal application for WNAC–TV, an appropriate Section 1.514 issue will be specified. Further, since it appears that RKO may have failed to amend its application in a timely manner as prescribed by Section 1.65 of the Rules to reflect subsequent acquisitions of operating CATV systems, CATV franchises and microwave

[4] Attachment 2 consists of a portion of a prospectus, dated January 15, 1969, prepared by Cablecom-General, RKO's CATV subsidiary. Attachment 3 consists of two pages of a proxy statement filed by Cablecom with the S.E.C. and dated September 21, 1970.

[5] Construction was not completed on the Odessa system on January 15, 1969, but operations began in the completed portions in December of 1968.

interests, an appropriate 1.65 issue will be added. See *Lake Erie Broadcasting Company*, 34 FCC 2d 354, 24 RR 2d 64 (1972); *WTAR Radio-TV Corp., supra;* and Report and Order on *Reporting of Changed Circumstances*, 29 FR 15516, 3 RR 2d 1672 (1964). However, we do not believe that Community has demonstrated that RKO intentionally sought to withhold or conceal its CATV and microwave interests from the Commission, especially since RKO reported this information to the Commission in connection with its other broadcast stations. Further, in accordance with the procedure followed in *WTAR Radio-TV Corp.*, we will specify the Rule 1.514 and Rule 1.65 issues on a comparative basis only, because of the lack of clarity in this regard of the renewal form; because *Aberdeen, supra*, and *WTAR Radio-TV Corp.*, upon which we have relied, were released after RKO filed its renewal application for (WNAC–TV) in December, 1968; and because the relevant information was disclosed within approximately one month from the release of the *WTAR Radio-TV Corp.* case.

CROSS-INTEREST ISSUE

7. Community alleges that eight of the CATV systems listed by RKO in Hearing Exhibit 77 [6] are located in communities which lie within the Grade B Contour of Station KHJ–TV, Los Angeles, California; [7] that none of these interests were reported by RKO in the WNAC–TV renewal application; and that if they were acquired after July 1, 1970, Section 74.1131 of the Commission's Rules may have been violated in each case.[8] RKO, in opposition, argues that Section 76.501 does not apply to franchises but only to operative CATV systems; that two of the operating systems, Brea and Ventura, were in operation as of June 30, 1970, and the two others, La Habra and Redendo, were under construction in June, 1969 and May, 1970, respectively; and that RKO's President, John B. Poor, testified in hearing that Cablecom was in the process of disposing of its systems within the Grade B coverage of KHJ–TV. RKO alleges that Community has failed to make a *prima facie* showing in support of its request for a cross-interest issue. Both the Broadcast Bureau and Dudley support the requested issue.

8. Community's request for a cross-interest issue will be denied. The Board agrees with RKO that Community has failed to make a *prima facie* showing in support of the requested issue. Thus, it appears that four of these CATV systems were in operation or under construction prior to July 1, 1970, and therefore that RKO is not in violation of Section 76.501 of the Commission Rules with regard to these systems

[6] Four systems are currently in operation—Brea, La Habra, Redendo Beach and Ventura. RKO has franchises for the remaining four systems located in Los Angeles County, Orange County, Placentia and Yarba Linda.

[7] RKO is the licensee of Station KHJ–TV.

[8] Although petitioner refers to Section 74.1131 of the Rules, this Section has been deleted, effective March 31, 1972. (37 FR 3252). Section 76.501(a) of the Rules, which now prohibits cross-interest of broadcast facilities and CATV systems, provides that no CATV system shall *carry the signal* of any television broadcast station if such system owns, operates, controls or has an interest in a television station whose predicted Grade B contour overlaps in whole or in part the service area of such system. Paragraph (b) of Section 76.501 provides, in effect, that paragraph (a) is not effective until August 10, 1973 if the CATV interest or franchise were in existence on or before July 1, 1970, and that paragraph (a) is effective on August 10, 1970, for those interests acquired after July 1, 1970.

at the present time. Further, RKO has only franchises for the remaining four CATV systems and, since the proscription of Section 76.501 applies only to carriage of signals and therefore to operating CATV systems, (see footnote 8, *supra*), it does not appear that RKO is in violation of Section 76.501 of the Commission Rules: Community's request for a cross-interest issue must therefore be denied.

9. Accordingly, IT IS ORDERED, That the "Comments of the Dudley Station Corporation In Support of Community's Petition to Enlarge Issues Against RKO General, Inc." ARE ACCEPTED to the extent indicated above, and ARE DISMISSED in all other respects; and,

10. IT IS FURTHER ORDERED, That the "Motion For Leave to File a Pleading Addressed To Comments of the Dudley Station Corporation in Support of Community's Petition to Enlarge Issues Against RKO, General, Inc.," filed by RKO on January 31, 1973, is DENIED, and RKO's motion to strike or opposition to Dudley's pleading is DISMISSED; and

11. IT IS FURTHER ORDERED, That Dudley's opposition to RKO's motion to strike or opposition and Dudley's comments on RKO's motion for leave to file a pleading, both filed on February 12, 1973, ARE DISMISSED; and

12. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed January 3, 1973, by Community Broadcasting of Boston, Inc. IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

13. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issues:

(a) To determine whether RKO General, Inc. (WNAC–TV) has violated Section 1.514 of the Commission's Rules by failing to report all of its CATV operating systems, franchises, and microwave interests in its renewal application for WNAC–TV; and, if so, to determine the effect thereof upon the applicant's comparative qualifications to be a Commission licensee; and.

(b) To determine whether RKO General, Inc. (WNAC–TV) has violated Section 1.65 of the Commission's Rules by failing to notify the Commission, in a timely manner, of its subsequent acquisitions of CATV operating systems, CATV franchises, and microwave interests; and, if so, to determine the effect thereof upon the applicant's comparative qualifications to be a Commission licensee;

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-257

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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|---|---|
| In Re | |
| SPECTRUM CABLE SYSTEMS, INC., AGAWAM, MASS. | CAC-381, CSR-148, CSR-181 MA046 |
| SPECTRUM CABLE SYSTEMS, INC., WEST SPRINGFIELD, MASS. | CAC-601 MA053 |
| SPECTRUM CABLE SYSTEMS, INC., WESTFIELD, MASS. | CAC-602 MA052 |
| For Certificates of Compliance | |

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1973; Released March 14, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. Spectrum Cable Systems, Inc. has filed applications for certificates of compliance for new cable television systems at Agawam, West Springfield, and Westfield, Massachusetts. Spectrum's applications are opposed by The WHYN Stations Corporation, licensee of Station WHYN-TV, Springfield, Massachusetts, and by Springfield Television Broadcasting Corp., licensee of Television Broadcast Station WWLP, Springfield, Massachusetts, which have filed petitions for special relief and objections to the specific applications. These pleadings are opposed by Spectrum, and WHYN Stations and Springfield have replied. Spectrum proposes to carry the following television signals on its proposed systems: WTIC-TV (CBS), WHCT-TV (Ind.), Hartford, Connecticut; WTNH-TV (ABC), New Haven, Connecticut; WHNB-TV (NBC), New Britain, Connecticut; WSBK-TV (Ind.), Boston, Massachusetts; WKBG-TV (Ind.), Cambridge, Massachusetts; WGBY-TV (Educ.), WWLP (NBC), WHYN-TV (ABC), Springfield, Massachusetts.[1]

2. WHYN Stations objects to the proposed carriage of WSBK-TV and WKBG-TV in a three county area which comprises its ADI, and asserts that Spectrum's claim to carry these two distant signals rests on its location in the Hartford-New Haven-New Britain-Waterbury market (#19). WHYN argues that Agawam, West Springfield, and Westfield are also located in the Springfield market (a smaller television market), and though Section 76.61(f) of the Rules provides that if a system is located in both a first fifty market and a smaller television market, the carriage rules of the first fifty markets apply

[1] Carriage of these signals is admittedly consistent with Section 76.61 of the Commission's Rules but both petitioners argue that the Springfield market deserves a special status.

(so that the carriage of the contested signals would be permitted), nevertheless, the circumstances of the Springfield market justify prohibition of the disputed signals. WHYN incorporates by reference its "Petition for Reconsideration" of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143,[2] in which it argues that the effect of our new rules is to increase drastically the number of signals which may be brought into the Springfield market and to expose it to more competition than would face stations in many larger markets. Finally, WHYN argues that network exclusivity has been reduced to simultaneously telecast programs, and that since Springfield is classified as a smaller market, it is not even entitled to syndicated program exclusivity under Section 76.153(b) of the Rules. Accordingly, it urges that if cable television systems are permitted to carry Boston and Hartford market stations which are not significantly viewed in Agawam, West Springfield, and Westfield, it should at least receive syndicated program exclusivity. Spectrum states that it would not object to providing syndicated program exclusivity if the Commission so directs. Springfield Television supports WHYN Stations' position, and argues further that failure to provide some measure of special relief could threaten the economic viability of the stations.

3. In *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150, 153, we explained the specific financial documentation we have traditionally required under similar circumstances:

> The showing which it was thought would have to be made was expected to include "specifics regarding its present financial condition, the impact any present CATV activity has had on its operation, or the exact nature of the other CATV operations it refers to." *E.g., GT&E Communications, Inc.*, FCC 67–134, 6 FCC 2d 643. [footnote omitted] While these considerations are not intended to be all inclusive, it is obvious that some demonstration along these lines must be made if the request for special relief is to be viewed as more than mere speculation.

In the instant case, WHYN Stations and Springfield—both of which operate network affiliated stations which will receive the benefits of network program exclusivity—have not submitted evidence to establish any likelihood of financial injury resulting from the proposal. Accordingly, we are not persuaded to depart from our avowed go-no go policy relative to signal carriage; however, we note that Spectrum has volunteered to provide syndicated exclusivity to WHYN–TV, and we assume would have no objection to providing similar protection to WWLP. In these circumstances, we will require that Spectrum extend first fifty major television market syndicated exclusivity pursuant to Section 76.151 *et seq* of the Rules to WHYN–TV and WWLP.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Application for Certification of Compliance" filed June 16, 1972, by The WHYN Stations Corporation IS DENIED.

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[2] In par. 49, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 345, we determined that this petition "may be meritorious" but that the preferable procedure would be to defer consideration of it for the certificating process where requests for special relief could be ruled on.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" filed by Springfield Television Broadcasting Corp., filed June 22, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance and for Special Relief" filed July 20, 1972, by the WHYN Stations Corporation, IS GRANTED to the extent indicated above and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Applications for Certificate of Compliance and Petition for Special Relief" filed by Springfield Television Broadcasting Corp., filed July 27, 1972, IS DENIED.

IT IS FURTHER ORDERED, That Spectrum Cable Systems, Inc.'s applications (CAC–381, 601, 602) ARE GRANTED subject to the condition contained in paragraph 3, above, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

40 F.C.C. 2d

109–039—73——9

F.C.C. 73-469

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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|---|---|
| In Re | CAC-799 |
| STORER CABLE TV, INC., SUISUN CITY, CALIF. | CA-479 |
| STORER CABLE TV, INC., ROCKVILLE, CALIF. | CAC-800 |
| For Certificates of Compliance | CA-480 |

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1973; Released May 9, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER REID CONCURRING IN THE RESULT.

1. On June 30, 1972, Storer Cable TV, Inc., filed applications for certificates of compliance (CAC-799, CAC-800) for proposed new 60 channel capacity cable television systems at Suisun City and Rockville, California. These systems are to be located in the San Francisco-Oakland-San Jose, California television market (#7), and Storer proposed to carry the following California television broadcast signals: KQED (Educ.), KQEC (Educ.), KRON-TV (NBC), KPIX (CBS), KGO-TV (ABC), KEMO-TV (Ind.), KBHK-TV (Ind.), all San Francisco; KVIE (Educ.), KCRA-TV (NBC), KXTV (CBS), KTXL (Ind.), all Sacramento; KNTV (ABC), KGSC-TV (Ind.), both San Jose; KOVR (ABC), Stockton; KTVU (Ind.), Oakland; and KFTY (Ind.), Santa Rosa. On August 21, 1972, Central California Educational Television, licensee of Television Broadcast Station KVIE, Sacramento, California filed "Objections to Carriage and Request for Special Relief". On September 14, 1972, Storer filed an amendment in which it withdrew its proposal to carry KQEC and KQED, and on October 19, 1972, amended further to request carriage of Station KMUV-TV (Ind., C.P.), Sacramento, California. On February 7, 1973, KVIE withdrew its objections and, on February 21, 1973, Storer again amended its applications to request waiver of Sections 76.251(a)(4)[1] and 76.61(a) (See Appendix A) of the Commission's Rules.

2. Storer seeks a partial waiver of Section 76.251(a)(4) of the Rules in order to allow it to utilize the public access studio and production facilities which are presently being constructed at its existing system in the adjacent community of Fairfield (which is located in the Sacramento-Stockton-Modesto market). Storer argues that Suisun City and Rockville are contiguous communities with a combined population of about 5,400 and a subscriber potential of 2,000, and thus do

[1] Section 76.251(a)(4) of the Rules provides in relevant part that:
"Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel."

not warrant a separate investment in equipment; that these communities are economically, and geographically integrated and it would be artificial to consider them as distinct communities for public access channel purposes; and that the studio and production facility in Fairfield is no more than three miles from the furthest point in Suisun City and six miles from the far side of Rockville.

3. In Paragraph 147 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 197, we stated that small communities in major markets "are free to meet their (access) obligations through joint building . . . with cable operators in the larger core areas". We believe that the size and contiguity of these communities and their proximity to Fairfield (population in excess of 40,000) justifies a partial waiver allowing Suisun City and Rockville to share the studio and production facility in Fairfield. We note that Fairfield is an existing system and does not have to provide access channels on its system until March 1977, but has initiated construction of a studio in order to provide access to all three communities, and expects to complete construction by mid-summer of this year. Accordingly, we will permit Suisun City and Rockville to delay providing public access until October 1, 1973, the date on which the studios are expected to be ready.

4. Storer requests a waiver of Section 76.61(a) of the Rules in order to carry Station KMUV–TV, Sacramento, California, on its systems at Suisun City and Rockville as a local signal. Storer argues that when KMUV–TV comes on the air it will be carried on its Fairfield system and an extension of the signal onto the other systems will have a *de minimis* effect on existing broadcast operations. Storer also points out that it would be allowed to carry KMUV–TV if it were significantly viewed (the predicted principal community contour of KMUV–TV extends several miles beyond Suisun City and Rockville).

5. We reject Storer's request for waiver of Section 76.61(a) of the Rules. Storer has filled its quota of signals as authorized by Section 76.61(a) and has not persuaded us that its circumstances are so unusual as to justify the requested waiver.[2]

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the requested waiver of Section 76.61(a) of the Commission's Rules IS DENIED.

IT IS FURTHER ORDERED, That the requested waiver of Section 76.251(a)(4) of the Commission's Rules IS GRANTED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–799, CAC–800) filed by Storer Cable TV, Inc., ARE GRANTED to the extent indicated above and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Objections to Carriage and Request For Special Relief", filed August 21, 1972, by Central California Educational Television ARE DISMISSED.

FEDERAL COMMUICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[2] This denial of the waiver request would not prevent Storer from carrying KMUV–TV as a distant independent signal pursuant to Section 76.61(c) of the Rules.

## APPENDIX A

*§ 76.61 Provisions for first 50 major television markets.*

A cable television system operating in a community located in whole or in part within one of the first 50 major television markets listed in § 76.51(a) shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such cable television system may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part: *Provided, however,* That where a cable television system is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the cable system is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(3) Television translator stations with 100 watts or higher power serving the community of the system and, as to cable systems that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the system. In addition, any cable system may elect to carry the signal of any noncommercial educational translator station;

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market);

(5) Commercial television broadcast stations that are significantly viewed in the community of the system. See § 76.54.

(b) Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of three independent television stations: *Provided, however,* That in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit. The following priorities are applicable to the additional television signals that may be carried:

(1) *Full network stations.* A cable television system may carry the nearest full network stations, or the nearest in-state full network stations:

NOTE: The Commission may waive the requirements of this subparagraph for good cause shown in a petition filed pursuant to § 76.7.

(2) *Independent stations.* (i) For the first and second additional signals, if any, a cable television system may carry the signals of any independent television station: *Provided, however,* That if signals of stations in the first 25 major television markets (see § 76.51(a)) are carried pursuant to this subparagraph, such signals shall be taken from one or both of the two closest such markets, where such signals are available. If a third additional signal may be carried, a system shall carry the signal of any independent UHF television station located within 200 air miles of the reference point for the community of the system (see § 76.53), or, if there is no such station, either the signal of any independent VHF television station located within 200 air miles of the reference point for the community of the system, or the signal of any independent UHF television station.

NOTE: It is not contemplated that waiver of the provisions of this subparagraph will be granted.

(ii) Whenever, pursuant to Subpart F of this part, a cable television system is required to delete a television program on a signal carried pursuant to subdivision (i) of this subparagraph or paragraph (c) of this section, or a program on such a signal is primarily of local interest to the distant community (e.g., a local news or public affairs program), such system may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the cable system need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(c) After the service standards specified in paragraph (b) of this section have been satisfied, a cable television system may carry two additional independent television broadcast signals, chosen in accordance with the priorities specified in paragraph (b)(2) of this section: *Provided, however,* That the number of additional signals permitted under this paragraph shall be reduced by the number of signals added to the system pursuant to paragraph (b) of this section.

(d) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such cable television system may carry the signals of any noncommercial educational stations that are operated by an agency of the State within which the system is located. Such system may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommerical educational station or State or local educational television authority.

(e) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry:

(1) Any television stations broadcasting predominantly in a non-English language; and

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.

(f) Where the community of a cable television system is wholly or partially within both one of the first 50 major television markets and another television market, the provisions of this section shall apply.

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In Re Filing of
SUPPLEMENTAL PLEADINGS BEFORE THE REVIEW BOARD

(October 11, 1972)

FILING OF SUPPLEMENTAL PLEADINGS BEFORE THE REVIEW BOARD

The Review Board is concerned about the delays which are being caused by the filing of supplements to pleadings and unauthorized pleadings, each of which starts a new series of pleadings. While the filing of supplements occasionally can be justified and the Commission's Rules permit such filings when specifically requested or authorized (Sections 1.45 and 1.294 of the Rules), the filing of successive supplements long after the initial interlocutory pleading was filed, as has occurred recently, have inordinately delayed the adjudicatory process. Therefore, the justification for supplemental pleadings and the extent to which the filing complies with the Commission's Rules will be closely scrutinized and the Rules strictly construed when such pleadings are submitted to the Review Board.

F.C.C. 73–402

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re<br>TELEPROMPTER CABLE SYSTEMS, INC., ELMIRA, N.Y.<br>For a License in the Cable Television Relay Service | CPCLD–12 |

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1973; Released April 23, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. TelePrompTer Cable Systems, Inc., a subsidiary of TelePrompTer Corporation, has filed an application in the Cable Television Relay Service for a license to cover construction permit. The application has been processed, is consistent with all requirements, and is available for grant. We have decided, however, to examine the application in light of the criminal convictions of the Corporation and its former president, Irving Kahn, to determine whether a grant would be in the public interest.

2. TelePrompTer Corporation and Mr. Kahn were convicted on October 20, 1971, of Federal Conspiracy (18 U.S.C. § 371) and violation of the Travel Act (18 U.S.C. § 1952). In addition, Mr. Kahn was convicted individually of perjury (18 U.S.C. § 1621). The convictions resulted from unlawful payments made in 1966 to several Johnstown, Pennsylvania city officials to induce them to award TelePrompTer a cable television franchise. The convictions were recently affirmed on appeal [*United States* v. *Kahn*, Nos. 71–2205–6, 72–1776–7 (2d Cir., Jan. 9, 1973)], and, on March 1, 1973, the Corporation filed a writ of certiorari with the Supreme Court. Consequently, the Commission on its own motion undertook an investigation pursuant to Section 403 of the Communications Act to ascertain whether TelePrompTer is qualified to be a licensee of the Commission.

3. The Commission has on past occasions dealt with the question of the effect of criminal convictions on applications for Commission authorizations. In *Report on Uniform Policy as to Violations by Applicants of Laws of the United States*, 1 P & F Radio Reg., Part 3, 91:495 (1951), the Commission concluded that if an applicant has been involved in unlawful practices, an analysis of the substance of the practices must be made to determine their relevance and weight with regard to the applicant's qualification to use the requested authorization in the public interest. The Commission also stated that there may be extenuating or other favorable considerations which

outweigh the record of unlawful conduct and qualify the applicant to receive Commission authorization. In *Westinghouse Broadcasting Company, Inc.*, 22 P & F Radio Reg. 1023 (1962), the Commission held that violations of Federal antitrust laws by the parent company of an applicant for renewal of broadcast licenses was a serious reflection on the licensee's character but was outweighed by the superior broadcast record of the licensee. Similarly, the Commission held in *General Electric Co.*, 2 P & F Radio Reg. 2d 1038 (1964), that violations of Federal antitrust laws are not absolutely disqualifying, but are a circumstance from which the Commission may draw inferences as to probable future conduct. The Commission noted a revised organizational structure and compliance program to avoid further antitrust violations, considered the company's broadcast record, which was found to be meritorious, and granted renewal. Significant in both the *Westinghouse* and *General Electric* cases was the fact that the persons involved in the criminal activity were not the same persons who managed and controlled the broadcast facilities. Although these cases involved licenses for broadcast facilities, they are instructive to point out how the Commission has treated an applicant's past criminal record in its consideration of whether grants of Commission authorizations would be in the public interest. Thus in *Page Boy, Inc.*, 8 P & F Radio Reg. 1108 (1954), *aff'd sub nom. Klein* v. *FCC*, 232 F. 2d 73 (D.C. Cir., 1956), the Commission, citing the *Report on Uniform Policy, supra*, denied an application for a construction permit in the Domestic Public Land Mobile Radio Service on the basis of the Hearing Examiner's finding that the applicant had engaged in conduct leading to a fraud order by the Postmaster General and therefore lacked the requisite qualification to be a licensee.

4. Our investigation of TelePrompTer was based on concepts derived from prior Commission actions in analogous cases. We attempted to analyze the substance of the violations to determine their relevance and weight, to ascertain the existence of countervailing or extenuating circumstances and other favorable facts which might outweigh the record of unlawful conduct, and to weigh these factors against the relevant public interest considerations. Commission staff interviewed the prosecutor who tried the case, reviewed the relevant portions of the trial transcripts, addressed interrogatories to TelePrompTer, and examined TelePrompTer's annual report forms and other documents on file with the Commission. The Commission attempted particularly to determine which TelePrompTer employees or officers participated in the unlawful acts for which the Corporation was convicted, if any of these persons are employed presently by the Corporation, whether the Corporation has undertaken its own investigation to uncover other similar unlawful acts, and what corrective measures and new programs the Corporation has instituted to guard against a repetition of such criminal activity by its employees and officers.

5. Shortly after the Corporation's and Mr. Kahn's convictions, the shareholders of the Corporation elected a new Board of Directors. Prior to the election, the Board was controlled by Mr. Kahn. A majority of the new Board is composed of members selected by Jack Kent Cooke, a Director and the Corporation's largest shareholder. Ten of the fourteen directors had not previously been directors of the Cor-

poration. The only member of the new Board who was part of management during the period of misconduct is Hubert J. Schlafly, whose participation in management was confined completely to engineering matters.

6. Soon after the new Board of Directors was elected, Raymond Shafer, one of the new Directors, was elected Chairman and Chief Executive Officer. Mr. Shafer, who serves substantially full time, is a former District Attorney and Lieutenant Governor of the Commonwealth of Pennsylvania; he was Governor of Pennsylvania from 1967 to January 1971.

7. On July 17, 1972, the Board of Directors elected William Bresnan President of the Corporation. He was subsequently elected Chief Operating Officer. Mr. Bresnan was previously employed by Jack Kent Cooke, Incorporated and Continental Cablevision, Inc., which were acquired by H & B American Corporation in 1968. He then became Executive Vice President and Director of H & B. On September 17, 1970, when H & B merged with TelePrompTer, Mr. Bresnan became Vice President of TelePrompTer. Thus, Mr. Bresnan joined TelePrompTer more than four years after the commission of the acts which resulted in the criminal convictions. Mr. Bresnan is also currently Chairman of the National Cable Television Association.

8. The election of the new Board of Directors constitutes a transfer of control of the Corporation and requires prior Commission approval under Section 310(b) of the Communications Act. No such approval has been given.

9. On November 22, 1971 Mr. Cooke, moving quickly after the October 20 criminal convictions of Kahn and the Corporation, notified the Commission by letter from his counsel that he had initiated a solicitation of proxies from TelePrompTer shareholders, with a view toward electing a Board of Directors that would be "independent" of the influence of Kahn. The names of the members of Mr. Cooke's independent slate were furnished, along with their principal business and professional identifications and assurances of United States citizenship and basic qualification to hold communications licenses. The notification contended at length that bringing off the program would not constitute a transfer of control within the meaning of Section 310(b), but requested, if the Commission were of a contrary view, that the letter and its attachments be treated as an informal application and be granted on an expedited basis.

10. Three days earlier, or on November 19, the Securities and Exchange Commission had cleared the proxy material by Mr. Cooke and the mailing was accomplished by the time of the November 22 notification to us. Contemporaneously with this activity, suit was brought by Cooke against TelePrompTer in the United States District Court for the Southern District of New York to compel adjournment of the annual stockholders meeting then set for November 30. And on November 23, the day after the earlier-mentioned notification to us, decision was rendered putting off the annual meeting to permit Cooke reasonable opportunity to make his case with the shareholders. In the decision, *Cooke* v. *TelePrompTer Corp.*, 334 Fed. Supp. 467, 469 (S.D.N.Y. 1971), reference was made to an affidavit submitted by the plaintiff advising that:

". . . Cooke believes that a proxy fight will only injure TPT . . . his sole desire is to have Kahn removed from office . . . if Kahn is removed as an officer and director of TPT (as a result of which the voting agreement will automatically terminate) Cooke will not launch or participate in a proxy fight."

11. The proxy contest was terminated on December 2 when Mr. Cooke entered into an agreement with TelePrompTer management providing for the nomination of a new slate of directors, a majority of whom were also members of the slate of directors proposed by Cooke in his earlier proxy solicitation. This was followed by a letter dated the next day, or December 3, from counsel for Cooke referring to the November 22 letter and reciting that:

"The specific relief requested in the November 22, 1971 filing may not be required; however, a question may still obtain whether or not *de facto* control under Section 310(b), *supra*, will be changed when the TelePrompTer shareholders elect a new board of directors at their postponed annual meeting now scheduled for January 21, 1972.

"We will continue to keep the Commission advised of developments and request appropriate relief as promptly as circumstances permit."

12. The new developments were brought to the Commission's attention by letter from TelePrompTer's counsel on January 7, 1972, or four days before the annual meeting at which the election of directors was held. This letter described its purpose as

". . . to report information to the Commission concerning a prospective change in the Board of Directors of . . . TelePrompTer . . .

It is contemplated that a change will take place in the current Board of Directors whereby new personnel will be added in lieu of certain existing directors. With respect to each of the new directors, TelePrompTer is furnishing that biographical and business background information normally requested by the Commission in appropriate application forms . . .

Attachments to the letter recited that:

"TelePrompTer Corporation contemplates that certain personnel changes will take place in its Board of Directors pursuant to the resumption of an Annual Shareholders Meeting to take place January 11, 1972 . . . While certain personnel changes in the Board will, in all probability, take place, such transactions do not represent changes in stock ownership of the Corporation. Nor do these prospective changes contemplate any modifications or other changes in the management policies . . ."

Additionally, information was included that furnished for all new directors relevant data as to status, history of involvement in communications matters, stock and financial ties to the Corporation, etc.

13. All of the material in the January 7 letter was hand delivered to the Cable Bureau on January 10, along with a covering letter that recited:

"The information furnished here (in the January 7 letter) is tailored to that sought from applicants and their principals in the Common Carrier Service insofar as such information relates to management personnel. That information requested in the Common Carrier Service is, as you know, substantially more comprehensive in scope and character than that elicited for CARS applicants in this regard. The changes in the parent-company Board do not contemplate any changes in the management policy or, at this time, in the officers of the Corporation or its subsidiaries.

Accordingly, we bring this matter to your attention in order that the Cable Bureau may be certain that all of the information sought in the CARS service, including citizenship data, other broadcast interests, etc., is currently on file with the Commission and that it is fully consistent, we believe, with all of the policies and requirements of both the Bureau and the Commission."

14. The agreed-upon slate of directors was elected at the annual meeting on January 11.

15. With the Commission's approval, letters dated April 5, 1972 were addressed to TelePrompTer and to Mr. Cooke asking for relevant documents and for explanation of the failure to follow requirements of Section 310(b) that prior consent be obtained to transfer control of a radio licensee. A consolidated response of April 27 combs the factual background recited above, brings together and resubmits the relevant documents, again places the matter before the Commission for its ruling on whether a transfer did take place and, if so, asks that the submitted materials be considered informal application for consent.

16. Transferring control of a radio license without following the procedures that require prior consent is a serious matter which is inconsistent with the standard of conduct expected of a Commission licensee. It diminishes the tight informational controls on license ownership that are necessary to the effective functioning of the regulatory machinery, it permits the insinuation of disqualified persons into the communications apparatus and, when we are faced with an application after the fact, defuses our option to say "no".

17. We recognize that there are unusual circumstances in this case. Prior to the signing of the settlement agreement there must have been some confusion as to who was in a position to file a formal application for prior consent. The group headed by Mr. Cooke did keep the Commission advised, to a substantial extent, of many of the events. They were understandably desirous of acting quickly to remove Mr. Kahn from a position of control and restore public confidence in the Corporation.

18. In view of the difficult and unusual circumstances present in this case, we believe that there is no point in pursuing this matter further. The new members of the Board are qualified, and we hereby consent to the transfer of control.[1] At the same time, we believe that the Corporation's failure to obtain prior Commission approval does reflect adversely upon it and should be taken into account by them in their future operations. In short, what is before us is most suitable for a forfeiture—not a beheading. Unfortunately, we do not now have legislative authority to impose such a forfeiture; hopefully, cases like this will lead to the enactment of legislative revision which the Commission is seeking in this area. The new management is thus advised that strict adherence to the commission's procedures is expected in the future. This Corporation, which participated in corrupt activities in Johnstown and Trenton, simply can not afford to engage in any conduct which would be inconsistent with the standards expected of a licensee.

19. On January 11, 1972—the same date the new Board of Directors was elected—the Board authorized an exhaustive special study by the Corporation's new law firm. Simultaneously, the new management began a "housecleaning" in an attempt to purge itself of its criminal past.

20. The only TelePrompTer employee or officer charged in the Johnstown criminal proceeding was Irving Kahn. Four other representatives of TelePrompTer were present in the motel room where, ac-

[1] Filing fees, as appropriate, shall be submitted by the Corporation within 30 days.

cording to the trial testimony, the first bribe offer was made by Mr. Kahn to city officials: Caywood C. Cooley, Jr., Vice President, CATV Division; Walter A. Kinash, manager of the Johnstown cable system; Walter C. Schier, outside New York counsel for the Corporation; and Sam DiFrancesco, Jr., TelePrompTer's Johnstown counsel. The Corporation checks which were indirectly channeled to city officials as payments for the unlawful scheme were signed variously by Messrs. Kahn, George Leibowitz, then Treasurer of TelePrompTer, and Eugene Weinrich, then Secretary. False invoices were initialed by Messrs. Kahn, Weinrich, and Kinash. None of the above-mentioned persons is now associated with TelePrompTer except Mr. Kinash and Mr. DiFrancesco. The new management concluded that the nature of Mr. Kinash's involvement in the scheme did not warrant termination of his employment since his duties did not and do not include franchising matters, and since he is closely supervised by the Corporation's Northeast Regional Office. Present management feels Mr. Kinash was not involved in Mr. Kahn's decision to make the payments and did not have the alternative of reporting the matter to a higher corporate level since Mr. Kahn was the Chief Executive Officer. Management is satisfied that when Mr. Kinash initialed approval of the false invoice he acted under the direction of Mr. Weinrich, a corporate officer, who was in turn acting under the direction of Mr. Kahn. Sam DiFrancesco, Jr., is a member of the firm of Gleason, DiFrancesco, Shahade & Markowitz, which apparently still handles local real estate, title, and easement matters for TelePrompTer.

21. TelePrompTer officials were also involved in a criminal proceeding in connection with the award to the Corporation of its franchise for the City of Trenton, New Jersey. On March 24, 1971, three public officials and TelePrompTer's former counsel in Trenton, Richard L. Gray, were indicted by a Mercer County grand jury for conspiracy to accept monies, misconduct in office, extortion, and receiving monies in exchange for official votes. Mr. Kahn; Robert H. Symons, then Vice President, CATV Division; Thomas Moscarello, an employee of TelePrompTer's Master Antenna Division who resided in Trenton; and the Corporation were named as co-conspirators but not indicted. Messrs. Kahn, Symons, and Moscarello testified before the grand jury and at the trial under grants of immunity. Mr. Gray has not yet been brought to trial because of illness. Two of the public officials were found not guilty by the jury and the charges against the third were dismissed at the conclusion of the State's case.

22. The Corporation's investigation of the circumstances surrounding the Trenton case revealed that several checks amounting to over $100,000 were paid by the Corporation to Mr. Gray, purportedly for professional services which in fact were not rendered. The checks were signed variously by Messrs. Kahn, Weinrich, and Hubert Schlafly, Vice President. The false invoices paid by the checks were variously initialed by Messrs. Kahn, Symons, Weinrich and Moscarello. Of the persons named, only Schlafly and Moscarello remain with the Corporation. In management's opinion there was no basis for Mr. Schlafly to have suspected any misconduct. Mr. Moscarello is involved in clerical, budgeting, and administrative matters and not franchising. He was a long time resident of Trenton and apparently Mr. Symons

asked Mr. Moscarello to introduce Symons to the city officials. Management is satisfied that Mr. Moscarello was not a party to any bribe offers and was in no way involved in the decision of Kahn and Symons to make the payments. He was aware of what was going on around him but, like Mr. Kinash, did not have the alternative of reporting the matter to a higher corporate level. Beyond the Johnstown case, the Trenton incident was the only case of misconduct TelePrompTer's investigation uncovered.

23. In view of the facts of the Johnstown and Trenton cases, management has instituted several corrective measures and new programs to guard against repetition of such criminal activities by its employees and officers. The new Board of Directors established a Franchise Committee headed by Charles Luckman, President of Ogden Development Corporation, architects and planners. The Franchise Committee has established policies for the acquisition of franchises and supervises franchising activities. Governor Shafer bears the ultimate responsibility to prevent such acts. He receives weekly reports from each department head and is involved personally in every franchise application. Hugh E. Flaherty has been appointed Vice President, Community Development, and is in charge of franchising matters; he reports directly to Governor Shafer. Prior to joining TelePrompTer, Mr. Flaherty was Vice President of Information and Communications for the Western Pennsylvania National Bank in Pittsburgh. During Governor Shafer's term as Governor of Pennsylvania, Mr. Flaherty served as Secretary for Legislation and Public Affairs.

24. The new Board of Directors also established an Audit and Accounting Committee headed by Ralph F. Lewis, Publisher and Editor of the Harvard Business Review and former Senior Partner of Arthur Young & Co. Recently, William M. Trust, Jr., was named Controller. Mr. Trust was formerly Vice-President—Controller of American Securities Corporation. The Corporation also completed a computerized accounting system which furnishes comparative data to highlight deviations from period to period and to provide for tighter controls.

25. In addition to dismissing employees that the company determined were involved in illegal acts and appointing new top management who were not involved in past misconduct, the Corporation has begun a program of control and education at all levels to prevent future conflicts of interest or misconduct. In March, 1972, the Corporation adopted a Conflict of Interest Disclosure Policy and Questionnaire for all officers and employees from the level of system chief technician through officers and directors; no such policy had existed in the past. All affected employees must disclose financial interests they have or had since March, 1969, in TelePrompTer's suppliers, customers, and competitors. In addition, they must disclose outside employment, including outside directorships. Employees are warned not to accept gifts or entertainment of more than nominal value, not to acquire property which might create a conflict of interest, and not to accept a profit opportunity acquired as a result of employment. Each affected employee must sign a statement indicating he is familiar with these policies and submit an annual list of transactions which might contravene the policies. Furthermore, TelePrompTer has in-

structed its lawyers to intensify their educational efforts at all levels of the Corporation, placing special emphasis on the importance of avoiding recurrence of relationships which might lead to a conflict of interest or misconduct.

26. In the *Cable Television Report and Order*, 36 FCC 2d 141 (1972), the Commission determined that it was in the public interest for cable television to develop into more than a community antenna. We stated there that "[w]e envision a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals." Para. 120, *Cable Television Report and Order*, *id.* at 190. In this regard we particularly have encouraged public access channels, local origination of programs, and networking and interconnection among cable systems. We have also encouraged the development of new broadband uses for cable. Thus, the record of such uses by TelePrompTer is relevant to our consideration of the fitness of the Corporation and its subsidiaries to hold Commission authorizations.

27. TelePrompTer's management has stated that the company is deeply committed to the development of new services that will fulfill cable's promise; the facts seem to bear out management's stated intent. TelePrompTer's public access experiment in New York City is well known in the industry; programming on two public access channels averages 100 hours weekly, and the company maintains a storefront studio in Harlem to encourage walk-in use by community residents. TelePrompTer originates programs on ninety-six of its systems. Ninety percent of TelePrompTer's subscribers—650,000 homes—receive locally originated programs on cable. The schedules range from one and one-half to sixty hours per week and the production equipment ranges from a single black and white arrangement to an elaborate color studio. TelePrompTer employs 78 full-time program managers and four regional directors. The company also has begun implementing plans for networking and syndication of programs for cable systems. Sports events are already fed to a five-state regional network from the Nassau Coliseum in Uniondale, Long Island, and the company recently created an Office of Satellite Development to plan for satellite interconnection of cable systems. In the meantime, the company distributes several programs by sending video tapes to its various systems.

28. TelePrompTer has also been experimenting with non-entertainment uses of cable. In New York, the company has installed a telemedicine channel between a pediatric clinic in East Harlem and the Mount Sinai Medical Center to aid in the delivery of health care. In Mobile, Alabama, subscribers can telephone information requests to a library where a librarian then places the requested information in front of a television camera for display on a designated channel. TelePrompTer is also conducting an experiment in El Segundo, California, with a two-way "Subscriber Response System" which permits communications between terminals in subscribers' homes and a central computer and can be used for security and fire detection, opinion polling, interactive instructional programs, and pay-program selection.

29. TelePrompTer has continued to demonstrate its position of leadership in the cable television industry. The Corporation won fif-

teen of twenty-five Local Origination Awards given in 1972 by the National Cable Television Association. TelePrompTer established the industry's first Washington News Bureau. In minority employment, a subject with which the Commission is particularly concerned, TelePrompTer has the highest percentage of minority employees among the major multiple system operators. *TV Communications*, October, 1972, at 20. Hubert J. Schlafly, Executive Vice President, Technological Development, is coordinator of the Commission's Cable Television Technical Advisory Committee. Raymond Shafer served as a subcommittee chairman of the Federal/State-Local Advisory Committee.

30. The Trenton and Johnstown cases involved conduct that sharply draws the issue of TelePrompTer's qualifications. On occasions when the corporation was threatened with the loss of a franchise Mr. Kahn would enlist a local TelePrompTer employee to put him in contact with local officials. Kahn would then do what was necessary to pacify the officials, even if it meant channeling unlawful payments to the officials in exchange for their votes. Kahn and the Corporation claim to have been victims of extortion, which in certain cases might be a defense to a charge of bribery. But, whether or not the defense of extortion can be successfully interposed in a criminal trial, this Commission will in no way sanction the making of unlawful payments to secure cable television franchises. We agree with Judge Brieant's comments in a civil case arising out of the proxy battle which ensued after Kahn's conviction: "A listed American corporation dealing with municipal officials is simply not supposed to submit to extortion. If threatened with extortion, an officer of the corporation should report the attempted crime to State or Federal authorities." *Cooke* v. *TelePrompTer Corp.*, 334 Fed. Supp. 467, 472 (S.D.N.Y. 1971). On the other hand we must consider that—as a practical matter—TelePrompTer is not the same corporation it was from 1965 to 1967 when the unlawful acts took place. None of the corporate officers involved in the franchising process then is part of today's management team. Furthermore, the Corporation has amply demonstrated that it is a leader in and committed to the research and experimentation necessary for the development of non-broadcast uses of cable television.

31. In our judgment, and based on our review of corporate efforts to avoid future improprieties, we anticipate that the future conduct of the licensee will measure up to the expectations held when the license was issued. In the process of measuring fitness for the authorization being sought, we comb an applicant's background in an effort to uncover anything that might illuminate likely performance after the license is in hand. If TelePrompTer were applying as a new entrant into the business, other considerations might obtain. There would then be little indication of the public benefit likely to flow from a license grant. But this company is a long-time leader, its everyday operations giving repeated evidence of its commitment to the evolution of cable television as a promising component of the nation's communications structure. The grant of licenses, therefore, can take into account the public benefits likely to flow from permitting TelePrompTer to continue to move forward in such areas as access, originations, satellites, two-way, and the other promising areas of cable television. We are persuaded that the company has been turned around and that

controlling management has high credentials and the necessary motivation to make internal procedures work to avoid misconduct. We have balanced the considerations, and have given weight to the circumstances that this fledgling cable industry needs reassurance that its single biggest operator has successfully survived what must be considered a searing experience for the company. We are appalled by the lurid exposures in Johnstown and Trenton. We also think that the company has moved boldly to cleanse itself and that the public interest benefits from a healthy TelePrompTer seem assured. We, therefore, are resolving the question in the company's favor.

32. One other matter remains. In consenting on August 5, 1970, to the merger of TelePrompTer and H & B American, *TelePrompTer Transmission of Kansas, Inc.*, 25 FCC 2d 469, the Commission temporarily waived the provisions of Section 21.700 of its Rules, giving TelePrompTer an opportunity to cure a violation of the 50 percent non-affiliation requirement that was caused by the fact that the H & B systems were converted by the merger from unaffiliated to affiliated customers of TelePrompTer's common carrier microwave system. The authorization in that proceeding was specifically conditioned on TelePrompTer's filing with the Commission: (a) a detailed plan showing how it proposed to achieve compliance by February 1, 1971; (b) a monthly progress report on implementation of the plan; and (c) any necessary application for Commission authority by December 1, 1970. TelePrompTer did promptly notify the Commission that it would achieve compliance by the sale of one of its cable systems, and it made monthly progress reports, but they continued only until March 1971.

33. Compliance with the rule was not achieved by February 1, 1971 as required, nor has it yet been achieved. Apparently, TelePrompTer was unable to find a buyer for the cable system it sought to sell and is now attempting to reach compliance by adding new unrelated customers to its microwave system. After the merger the carrier was providing 24 channels of service to affiliated customers and 14 channels to unaffiliated customers. By February 1, 1971 it had added another channel to an unaffiliated subscriber. Subsequently, other applications were filed to provide service to unaffiliated customers, the most recent being filed on April 5, 1973. If these pending applications are granted and the facilities constructed, TelePrompTer would then be in compliance with the Rules.

34. Despite TelePrompTer's belated effort to reach compliance by this alternate method of adding new subscribers, it has failed to meet the February 1, 1971 date or to file any necessary applications by December 1, 1970 as required. It is apparent that TelePrompTer has not complied in timely manner with the conditions imposed.[2] Therefore, these facilities are, and have been, operating contrary to the terms of the authorization. We are of the view that TelePrompTer should not be permitted to reap any rewards as a result of its operations that are conducted in non-compliance with the Commission's order.

[2] TetlePrompTer had more than one or two options in achieving compliance. In addition to acquiring more unaffiliated customers, it could have sold one or more of seven cable systems, or transferred some or all of its common carrier facilties to the Community Antenna Relay Service.

35. Accordingly, we are directing TelePrompTer to reduce its common carrier charges to each of its affiliated cable systems by an amount equal to a ratio by which the number of affiliated channels exceeds the number of unaffiliated channels in service.[3] This savings to each cable system shall be passed on proportionately through refunds, as appropriate, to its individual subscribers. The reduction in charges shall cover the period from February 1, 1971, until April 5, 1973. However, as the ratio representing the imbalance has been reduced from time to time, the reduction in charges shall be reduced, as appropriate.

The foregoing disposes of the issue as to TelePrompTer generally, including, of course, its future operations. Thus, this determination will be deemed dispositive of the same general character issue in other pending TelePrompTer applications for licenses and Certificates of Compliance. But there remains the issue as to the proper course of action with respect to Johnstown and Trenton, where the improper conduct by TelePrompTer occurred. And here the foregoing discussion of the general issue is not dispositive, and there is presented an issue as to the applicability of the *Root Refining* doctrine (*Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (3d Cir., 1948), *certiorari denied*, 335 U.S. 912 (1949)). This doctrine is pertinent to ". . . the adjudicatory functions of an administrative agency."[4] *WKAT, Inc.* v. *FCC*, 219 F. 2d 375, 382 (D.C. Cir., 1960), *certiorari denied*, 368 U.S. 841 (1961). We shall therefore proceed in an orderly and prompt fashion to consider the issue of the applicability of the *Root* doctrine raised as to Johnstown and Trenton. We have reached no final decision: That would not be fair to TelePrompTer which is entitled to present its side fully before any final determination. An application for Trenton is already on file with the Commission, but not yet ripe for consideration; for Johnstown, the recently-filed application proposes only to add additional signals to an existing system and is not the full application contemplated for validating a grandfathered operation under Section 76.11(b) of the Rules. Accordingly, we are hereby directing that an appropriate application be filed within 60 days from the effective date of this order to permit the Commission to examine the Johnstown operation in light of the facts uncovered in the criminal proceeding. When we look at the facts and circumstances of these applications, we intend to examine fully the conduct of all those now connected with the company who may have participated in such activities and whether their continued association with the company would serve the public interest. And in connection with that filing and the pending Trenton

[3] This ratio is expressed as a fraction of which the numerator is the number of affiliated channels in service in excess of unaffiliated channels in service and the denominator is the number of affiliated channels in service. For example: 24 affiliated and 15 unaffiliated channels are in service. The average per channel rate per affiliated customer is $300 per month. Therefore, the charge to each affiliated system will be reduced by $112 per month per channel ($\frac{9}{24}$ x $300).

[4] We generally leave the issue of character to the franchising entity. In the *Cable Television Report*, we stressed that the cable applicant's good character is a requisite part of the public interest scheme and that the local franchising entity must focus on this matter (36 FCC 2d 141, 208 (1972)). It follows that the applicability of the *Root* doctrine bears directly on our public interest scheme for cable, and that in the unusual situation like this, the Commission itself can and must consider this aspect in the certification process. We stress that our intervention does not signal a new broad departure but rather is limited to the unique facts of this case—undisputed evidence concerning corruption of the governmental franchising process.



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request, TelePrompTer shall submit a statement setting forth fully its position on the issues presented by these two situations. After consideration of that submission, we shall then consider the next appropriate step.

Accordingly, IT IS ORDERED, That the above-captioned application IS GRANTED, and an appropriate license will be issued.

IT IS FURTHER ORDERED, That TelePrompTer Transmission of Kansas, Inc. and the TelePrompTer cable systems it serves SHALL REDUCE THEIR CHARGES as specified in paragraph 35 above, and that TelePrompTer Corp. SHALL PROVIDE the Commission with a report within 30 days of the release date of this order containing a full accounting of the amount refunded, including the method of computation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

There is much to be said about this case, little time to say it, but a necessity for some brief explanation of my dissent.

Teleprompter's officials have been charged, and convicted, with bribing local officials to gain cable television franchises.

The F.C.C. has today imposed no sanction with regard to the company in general, or those franchises in particular.

Although the former President of Teleprompter is now in jail, a few of the others who participated in this action are still employed or retained by Teleprompter in its day-to-day affairs.

The Commission imposes no sanctions regarding these facts.

Teleprompter has engaged—deliberately, and with over misrepresentation to the Commission—in an unauthorized transfer of control of the corporation, in express violation of the Communications Act of 1934.

The F.C.C. has winked at these violations, and now retroactively approves the transfer of control.

In view of the shortness of time before the Commission's opinion must be released (because of its impact upon the stock market), I will not discuss at length the applicable precedents nor put forward my analysis of the numerous errors in the Commission's past actions and its current disposition. Perhaps even these skeletal facts speak for themselves and it's just as well not to elaborate.

A summary of my view of the rock-bottom minimum appropriate disposition, however, is that we should:

(1) Dispose of the Trenton and Johnstown cases (where the bribery occurred) *prior* to granting the dozens of additional applications before us today. In my view, the disposition of those cases should require complete forfeiture and divestiture of all related franchises and any direct or indirect fruits of the wrongdoing.

(2) Require that current management be forbidden to continue operation of the company until proper applications for transfer of control have been filed and disposed of by the Commission. The current board of directors might be retained in the interim solely for the purpose of selecting new management.

(3) Require that the company discharge *all* employees found to have engaged in the bribery transactions.

(4) Grant no more than short term, conditional licenses for the dozens of applications *we* do approve.

I might simply note that this is but one more example of the range of sanctioned corporate abuse in this country. We have already found over $40,000 of fraud to be consistent with "the public interest." Apparently there will be *no* limit to what this Commission will permit as consistent with "the public interest," no case in which a *corporation* will be found to have violated its trust. Our most severe penalties continue to be reserved for *people*—the shrimp boat captain caught uttering a profanity over his radio telephone, the small town AM radio station operator who fails to paint his antenna tower, the radio amateur who strays off frequency. But the corporations are superhuman, above and beyond the law. If, perchance, one of their *employees* gets caught, that's the end of the matter. So long as he's disposed of, the corporation goes merrily on. And, in this case, not even all the guilty parties need be removed.

If and when America falls, it will be from the dry rot within. In an age when a $325,000 cash "contribution" to the President one day can produce a $700 *million* milk price rise for an inflation-weary people the next, perhaps we should not expect more from our independent regulatory agencies. But I would. And I do. And I dissent.

F.C.C. 73-497

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF THREE STATES BROADCASTING CO., INC., LICENSEE OF RADIO STATION WHJC, MATEWAN, W. VA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted May 9, 1973; Released May 11, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONERS WILEY AND HOOKS DISSENTING.

1. The Commission has before it a Petition for Reconsideration filed on November 13, 1972, pertaining to the Commission's Memorandum Opinion and Order of October 5, 1972 (FCC 72-885) which denied licensee's application for remission or mitigation of the forfeiture imposed by the Commission's Order of April 26, 1972, for violation of numerous Sections of the Commission's Rules and Section 317 of the Communications Act of 1934, as amended, *Three States Broadcasting Company, Inc.*, 35 FCC 2d 504.

2. The licensee reiterates the same arguments it has made in previous documents filed with the Commission, namely, that the forfeiture is excessive for the violations involved, and that the broadcast and logging of the "Record Corner" program was the primary basis for the forfeiture. The licensee contends:

> The Commission has consistently recognized that the determination of a licensee's liability for rule violations includes consideration of the severity of the individual violations as well as their number. *Henryetta Radio Co.*, 21 FCC 2d 825, 18 RR 2d 596 (1970). In the present case, that factor has apparently been ignored by the Commission; therefore, reconsideration is certainly warranted.

3. We have dealt with each of the licensee's arguments in the two previous Memorandum Opinions and Orders concerning WHJC's liability. See especially paragraph 7 of the Memorandum Opinion and Order adopted April 26, 1972, 35 FCC 2d 504 imposing the forfeiture, where we said:

> Licensee complains that the $2,000 forfeiture is too high, that other cases indicate that the Commission has assessed no more than a $500 forfeiture for "technical infractions of the Commission rules," and that the forfeiture would not be as severe were it not for the program "Record Corner" . . . Considering these and the other violations, we do not believe that the forfeiture is excessive. The amount of forfeiture is determined after consideration of the seriousness of the violations, the circumstances under which they were committed, their duration, and the financial condition of the licensee. *Laury Associates, Inc.*, 27 FCC 2d 870 (1971).

4. Each of the licensee's arguments for remission or mitigation has been carefully considered and we are not persuaded that the arguments merit any variation in the forfeiture.

5. Accordingly, IT IS ORDERED, That the Petition for Reconsideration, filed by Three States Broadcasting Company is DENIED.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Three States Broadcasting Company, licensee of Radio Station WHJC, Matewan, West Virginia.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-481

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of
WESTERN UNION TELEGRAPH CO.
Revision of Tariff F.C.C. No. 254; Transmittal No. 6803. Docket No. 19733

MEMORANDUM OPINION AND ORDER

(Adopted May 9, 1973; Released May 14, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. We have under consideration a "Petition of the Secretary of Defense For Investigation", filed November 3, 1972, on behalf of the Department of Defense (DOD). In its Petition the DOD requests the Commission to investigate the lawfulness of several revised tariff pages, effective November 20, 1972, of Private Line Tariff F.C.C. No. 254, of the Western Union Telegraph Company (Western Union) which were submitted by Transmittal Letter No. 6803 on October 18, 1972.

2. These revised tariff pages relate to Western Union's tariff offering of a data transmission and switching service known as Autodin, of which the DOD is sole user. The DOD contends that these revised tariff pages, which were filed by Western Union to liberalize regulations dealing with the use of customer-furnished tributary station equipment on the Autodin network, have failed to remedy the alleged basic unlawfulness of Western Union's prior interconnection regulations and completely fail in any way to satisfy the DOD's prior formal complaints, filed on March 9, 1972 and March 27, 1972, respectively. In these prior formal complaints, the DOD alleged that Western Union's tariff regulations with respect to use of customer-provided equipment on the Autodin network restricted the government from interconnecting its own terminal and switching equipment and communications systems with Western Union furnished facilities and that such restrictions were therefore unlawful and unreasonable in violation of Section 201(b) and 202(a) of the Communications Act of 1934, as amended.

3. Western Union, in its opposition to this DOD Petition, denies that the interconnection regulations relating to Autodin are now or ever have been unlawful or unreasonable, or in any way improper and alleges that these tariff revisions fulfill entirely the representations that Western Union made in its May 9, 1972 Answers to the DOD complaints, wherein Western Union stated that it would modify its Tariff F.C.C. No. 254 to afford the DOD greater flexibility in interconnecting terminal equipment in the Autodin network. Western Union alleges further that it was never contemplated that the interconnection

tariff revisions to be filed would relate to basic switching center equipment, modems, or to other units that perform signalling functions due to Western Union's need, as the carrier, to maintain control over this unique network so as to assure satisfactory performance.

4. We have reviewed the contentions of the parties, the prior tariff regulations, and these revisions which became effective on November 20, 1972, and are of the opinion that questions are presented as to whether these revised provisions are lawful within the meaning of Sections 201 (b) and 202(a) of the Communications Act. While these revisions do allow greater flexibility in interconnecting customer-provided terminal equipment in the Autodin network they, nonetheless, appear to be more restrictive in their overall application than those provisions of Western Union's Tariff F.C.C. No. 254 which are applicable to interconnection of customer-provided terminal equipment in private line services other than Autodin. For example, Western Union's general private line interconnection provisions would appear to allow the interconnection of customer-provided modems while the special Autodin interconnection provisions under question herein generally would not. The question therefore arises as to whether these more restrictive Autodin interconnection provisions are in any way justified by the fact that Autodin is a unique service, i.e., it is provided to a single customer and has unusual requirements as far as speed of service, reliability, accuracy, etc. An investigation into the lawfulness of these revisions will not only aid us in our resolution of the above question but aid us in our continuing efforts to formulate equitable and workable interconnection policies.

5. In the present case, we believe it desirable that the Administrative Law Judge render an Initial Decision and that the trial staff of the Common Carrier Bureau be separated from both the Commission and the Administrative Law Judge. As we have previously explained, 32 FCC 2d at pg. 90, the separation of the trial staff simply means that such staff: (1) will not make any oral presentations to the Administrative Law Judge or the Commission without the other parties being present, and (2) will not make any written presentations to the Administrative Law Judge or the Commission which are not served on the other parties.

6. Accordingly, IT IS ORDERED, That pursuant to Sections 201, 202, 203, 204, 205, 208, and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of the revised tariff pages filed by Western Union with Transmittal No. 6803 including any cancellations, amendments, or reissues thereof and IT IS FURTHER ORDERED, That no changes shall be made in such tariff pages during the pendency of this proceeding without prior approval by the Commission.

7. IT IS FURTHER ORDERED, That, without in any way limiting the scope of investigation, it shall include consideration of the following:

(1) Whether the charges, classifications, practices, and regulations published in the aforesaid tariff pages are or will be unjust and unreasonable within the meaning of Section 201(b) of the Act;

(2) Whether such charges, classifications, practices and regulations will, or could be applied to, subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or prejudice

to any person, class of persons, or locality; within the meaning of Section 202 (a) of the Act;

(3) If any such charges, classifications, practices, or regulations are found to be unlawful, whether the Commission, pursuant to Section 205 of the Act, should prescribe charges, classifications, practices, and regulations for the service governed by the tariffs, and if so, what should be prescribed.

8. IT IS FURTHER ORDERED, That, the hearing in this proceeding shall commence at the Commission offices in Washington, D.C. at a time to be specified by the presiding Administrative Law Judge; and that such Administrative Law Judge shall, upon the closing of the record, prepare an initial decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 C.F.R. 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C.F.R. 1.282 and that the trial staff of the Common Carrier Bureau be separated both from the Commission and from the Administrative Law Judge.

9. IT IS FURTHER ORDERED, That, Western Union is made Respondent and that the DOD is permitted to intervene as a party upon written notice within 20 days from the release of this order.

10. IT IS FURTHER ORDERED, That, the Secretary of the Commission shall send copies of this order by certified mail, return receipt requested, to the Department of Defense and The Western Union Telegraph Company, and shall cause a copy to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-462

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In Re Applications of<br>WESTINGHOUSE BROADCASTING CO.<br>For Renewal of License for Station KPIX-TV, San Francisco, Calif. | File No. BRCT-17 |
| CHRONICLE BROADCASTING CO.<br>For Renewal of License for Station KRON-TV, San Francisco, Calif. | File No. BRCT-94 |
| AMERICAN BROADCASTING COMPANIES, INC.<br>For Renewal of License for Station KGO-TV, San Francisco, Calif. | File No. BRCT-62 |

MEMORANDUM OPINION AND ORDER

(Adopted May 3, 1973; Released May 8, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it for consideration a Petition to Deny and to Intervene, filed November 1, 1971, by Alan F. Neckritz, hereinafter petitioner, directed against the above-captioned license renewal applications for Stations KPIX-TV, KRON-TV, and KGO-TV.[1]

2. Petitioner requests that the above-captioned license renewal applications be designated for evidentiary hearing on the grounds that the licensees (a) have failed to apply the fairness doctrine to product commercials raising ecological issues, and (b) have failed to take all reasonable measures to protect the public from deceptive advertising. In support of this request, petitioner incorporates by reference all previous documents filed in conjunction with his September 24, 1970 complaint directed against the licensees of five California television stations, including KPIX-TV, KRON-TV and KGO-TV. The substance of this complaint was that certain advertisements broadcast by these stations for Standard Oil of California's Chevron gasoline with the new F-310 additive raised a controversial issue of public importance and were otherwise deceptive.

3. The petition to deny and to intervene will be denied. We have already ruled that the licensees acted reasonably and in good faith in determining that the Chevron F-310 advertisements did not constitute the discussion of a controversial issue of public importance which required the presentation of contrasting views under the fairness doctrine. *In re Complaint of Alan F. Neckritz and Lawrence B. Ordower*,

[1] Also before the Commission are the following related pleadings: (i) Opposition, filed November 15, 1971, by Westinghouse Broadcasting Company, licensee of KPIX-TV; (ii) Opposition, filed November 16, 1971, by Chronicle Broadcasting Co., licensee of KRON-TV; (iii) Opposition, filed November 16, 1971, by American Broadcasting Companies, Inc., licensee of KGO-TV; and (iv) Reply to Opposition(s), filed December 1, 1971, by petitioner.

29 FCC 2d 807 (March 12, 1971); *In re Complaint of Alan F. Neckritz and Lawrence B. Ordower*, 37 FCC 2d 528 (October 12, 1972).[2] Even assuming, arguendo, that petitioner's claims that the Chevron F–310 advertisements do raise a controversial issue of public importance, the extraordinary relief requested by the petitioner would not be warranted. There is no pattern of fairness doctrine violations in this case sufficient to show that a grant of the above-captioned license renewal applications would be *prima facie* inconsistent with the public interest. 47 U.S.C 309(d)(1), (2). In *Brandywine Main-Line Radio, Inc.* (WXUR), 24 FCC 2d 18 (1970), *reconsideration denied*, 27 FCC 2d 565 (1971), *affirmed sub nom. Brandywine Main-Line Radio, Inc.* v. *FCC*, D.C. Cir Case No. 71–1181, Slip Op. (September 25, 1972), we found a pattern of fairness doctrine violations which constituted sufficient grounds for designation for evidentiary hearing and, in part, resulted in the denial of WXUR's broadcast authorization. Here, however, we merely have an allegation of an isolated violation of the fairness doctrine as it relates to product commercials.[3] The Commission does not normally designate for evidentiary hearing or defer action on an application for renewal of license on the basis of an isolated violation of the fairness doctrine. *WSBC Broadcasting Company*, 34 FCC 2d 651 (1972); *Congress of Racial Equality*, 27 FCC 2d 353 (1971). All that would be required would be that the licensees be directed to comply with the requirements of the fairness doctrine by presenting in their overall programming contrasting views on the controversial issue in question.

4. As noted above, the other contention advanced in petitioner's initial complaint was that the Chevron F–310 advertisements were de-

[2] After reviewing all pleadings filed in conjunction with petitioner's September 24, 1970 complaint, the Commission was unable to find any reasonable basis for reversing the licensees' determinations that the Chevron F–310 advertisements did not discuss a controversial issue of public importance. 29 FCC 2d 807. Petitioner then sought review of the Commission's ruling in the United States Court of Appeals for the District of Columbia Circuit (Case No. 71–1392). In a subsequent ruling the Commission also refused to extend its cigarette ruling (see *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F. 2d 1082 (1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 844 (1969) *affirming Cigarette Advertising*, 9 FCC 2d 921 (1967)), to advertisements urging the purchase of large displacement automobiles and high-test gasoline. *Friends of the Earth*, 24 FCC 2d 743 (1970). While petitioner's case was pending, the Court reversed the Commission in *Friends of the Earth* v. *FCC*, 146 U.S. App. D.C. 88, 449 F. 2d 1164 (1971). Since the licensees and the Commission had both relied in part on the *Friends of the Earth* ruling reversed by the Court, the Commission requested that the record be remanded for reconsideration in light of the Court's decision. When the Court granted the motion for remand, the Commission invited all parties to comment on the effect, if any, of *Friends of the Earth, supra*. Again, after reviewing all pleadings, the Commission remained convinced that traditional fairness doctrine principles did not require the broadcasting of contrasting views with respect to Chevron F–310, and could find nothing unreasonable about the licensees' conclusions that these advertisements "did not argue a position on a controversial issue of public importance, but merely advanced a claim of product efficacy." 37 FCC 2d 528. This decision is presently before the United States Court of Appeals for the District of Columbia Circuit for review (Case No. 71–1392).

[3] In applying the fairness doctrine the Commission has traditionally required licensees to afford reasonable opportunity for the presentation of contrasting views following the broadcast of one side of a controversial issue of public importance. Initially, our application of the fairness doctrine was applied only to programs wherein a controversial issue was discussed. When we extended the application of the fairness doctrine to product commercials it was intended to be limited to a single product—cigarettes. *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 FCC 2d 921 (1967). However, in *Retail Store Employees Union* v. *FCC*, Case No. 22,605, decided October 27, 1970, the issue was posed as to whether commercial advertisements call into play the fairness doctrine. See also *Friends of the Earth, supra*. Thus, on June 11, 1971, we issued a *Notice of Inquiry* into the efficacy of the fairness doctrine, Part II of which concerns itself with access to the media as a result of the presentation of product commercials. Petitioner herein has raised policy questions applicable to the communications industry as a whole and which are not peculiar to KPIX–TV, KRON–TV and KGO–TV. Such questions of policy which affect the entire commercial television industry are more appropriately resolved in a rule-making proceeding rather than in an adjudicatory renewal hearing as requested by petitioner. See *Hale* v. *FCC*, 425 F. 2d 556 (1970).

ceptive. Petitioner noted that the advertisements were the subject of a Federal Trade Commission inquiry and had been criticized by the California Air Resources Board, Friends of the Earth, and the Sierra Club. In the instant petition, petitioner maintains that the licensees have failed to take all reasonable measures to satisfy their obligations to protect the public from deceptive advertising. Petitioner asserts, therefore, that the Commission "* * * is compelled to either dismiss the renewal applications or schedule them for evidentiary hearing."

5. We have consistently maintained that licensees are under a duty to protect the public from false, misleading or deceptive advertising. *Public Notice—Licensee Responsibility With Respect to the Broadcast of False, Misleading or Deceptive Advertising*, FCC 61–1316 (November 7, 1961); *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (1960). While the record before the Commission reveals a dispute as to the accuracy of the Chevron F–310 advertisements, the Federal Trade Commission has yet to rule whether the advertisements were in fact false, misleading or deceptive. The mere fact that the Federal Trade Commission has issued a complaint is not tantamount to a final adjudication on the question. Under such circumstances, "* * * if there is submitted to a licensee advertising matter which has been the subject of an FTC complaint, he should realize that although no final determination has been made that the advertising in question is false or deceptive, a question has been raised as to its propriety, and he should, therefore, exercise particular care in deciding whether to accept it for broadcast." *Public Notice, supra*. However, as we previously stated, "we do not believe that the pendency of an unresolved FTC complaint of itself should be held to require cessation of the advertisements, for this would effectively resolve the issue against the respondent before he has been fully heard in the forum provided by Congress. We do expect a reasoned licensee judgment based on the facts available and his own capacity to ascertain the public interest." *Neckritz*, 37 FCC 2d at 813; see also *Television Advertising*, 32 FCC 2d 400, 407 (1971).

6. In our previous *Neckritz* rulings, *supra*, we expressed the opinion that "[t]here is substantial evidence in this case that the licensees' judgments were reasonable and consistent with Commission requirements that particular care be exercised in accepting for broadcast an advertisement subject to FTC complaint, in that '* * * all five stations either requested documentation of the advertiser's claims or made changes in the content of the advertisements'." 29 FCC 2d at 813, 37 FCC 2d at 532. Petitioner has presented no new facts which would cause us to change our prior determinations that the licensees acted reasonably and responsibly; indeed, petitioner appears to base his request for an evidentiary hearing on the grounds that the licensees have broadcast advertisements which may be found to be deceptive. Such an allegation is insufficient to require an evidentiary hearing, 47 U.S.C. 309(d) (1), (2).

7. Accordingly, IT IS ORDERED That the Petition to Deny and to Intervene, filed November 1, 1971, by Alan F. Neckritz IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73R-176

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

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| In Re Application of<br>WOIC, INC.<br>For Renewal of License of Station WOIC,<br>Columbia, S.C. | Docket No. 19674<br>File No. BR-1220 |

MEMORANDUM OPINION AND ORDER

(Adopted April 30, 1973; Released May 3, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The above-captioned proceeding was designated for hearing by Commission Memorandum Opinion and Order, FCC 73-106, 39 FCC 2d 355, released February 1, 1973. At issue is the renewal of license of Station WOIC, Columbia, South Carolina. Columbia Citizens Concerned with Improved Broadcasting (Columbia Citizens), a party to this proceeding,[1] filed a timely petition with the Commission to reconsider its designation Order insofar as it had found that "the Commission does not believe that a substantial and material question of fact has been raised with respect to the licensee's employment practices". At the first pre-hearing conference, considerable doubt was expressed as to the procedural soundness of a petition for reconsideration of this juncture. Accordingly, Columbia Citizens filed the instant petition to enlarge issues or in the alternative to certify the entire matter to the Commission on March 13, 1973.[2] WOIC argues in its opposition that the petition to enlarge is untimely filed, that Columbia Citizens has failed to show good cause for its late filing and that the petition should therefore be dismissed. The Board notes that the substance of Columbia Citizen's petition was timely filed in the form of a petition for reconsideration. In view of the relatively short time lapse and the fact that consideration of the petition to enlarge will not unduly delay the proceeding, the Board will treat it on its merits. However, we find no justification for certification of this matter to the Commission.[3]

2. Columbia Citizens contends that the Commission erred in failing to specify an issue inquiring into WOIC's employment practices since there is a dispute of facts which should be resolved in hearing. Moreover, it argues that the Commission failed to take into account the facts set forth in the Commission's fair employment reporting forms, which were filed for 1971 and 1972 by WOIC (both received by the Commission after the petition to deny had been filed), and the holding

[1] Columbia Citizens petitioned the Commission to deny WOIC's renewal and was named a party in the Commission's designation Order, *supra*.

[2] The Board also has before it oppositions to the petition to enlarge issues, filed by the Broadcast Bureau and WOIC, Inc. (WOIC) on March 22, 1973 and March 26, 1973, respectively, and Columbia Citizens' reply, filed April 5, 1973.

[3] See Sec. 0.361(b) of the Commission's Rules and Regulations.

of the U.S. Supreme Court in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). Columbia Citizens notes that three of its members submitted affidavits to the Commission in support of its petition to deny which stated that they had attended a meeting with two employees of WOIC who had advised them that, although they had managerial titles, their duties did not comport with their titles. Petitioner argues further that when the Commission found that the duties of the employees in question were consistent with the titles of their positions, the Commission accepted the affidavits of management and discounted its affidavits, thus denying it a hearing on a factual dispute which could only be fairly resolved in hearing. Moreover, Columbia Citizens points out that subsequent to the filing of its petition, certain forms concerning WOIC's employment practices have been filed with the Commission. Petitioner argues that these forms clearly indicate discriminatory employment practices on the part of WOIC. Thus, since the Commission did not specifically refer to these forms in the designation Order, they are matters which the Board could and should consider. Columbia Citizens also refers to an affidavit submitted with its reply to WOIC's opposition to its petition to dismiss which notes that certain of WOIC's employees had complained to the Office of Human Relations of South Carolina and alleged, among other things, that the qualifications for a time salesman at WOIC were a college degree and experience in the field. Based on this requirement, Columbia Citizens contends that WOIC is clearly guilty of a practice prohibited by the court in *Griggs*, *supra*.

3. The Broadcast Bureau and WOIC oppose the petition on its merits. As to the alleged dispute of facts, both the Bureau and WOIC note that these allegations were clearly before the Commission and were considered by it in its Memorandum Opinion and Order. Moreover, the Bureau urges that the holding in *Atlantic Broadcasting Co.* (*WUST*), 5 FCC 2d 717, 8 RR 2d 991 (1966), precludes the Review Board from adding the issue if the Commission has specifically ruled on the point. As to Columbia Citizen's argument concerning the *Griggs* case, the Bureau points out that the Commission found, in disposing of Columbia Citizen's argument concerning the requirements for sales representatives, that "there is no indication that a different standard is employed with respect to prospective white salesmen or that the criterion used constitutes an artificial barrier to black employment." Moreover, the Bureau notes, the Commission found "the WOIC's hiring pattern and employment profile belie a suggestion that blacks are confined to menial pursuits or are otherwise denied equal employment opportunities". In these circumstances, the Bureau contends, there is no conflict with the Court's holding in *Griggs*. Finally, WOIC denies that it requires a college degree for its sales personnel. As a matter of fact, it alleges, it has no sales people with such a degree.[4] As to the fair employment practices forms, the Bureau concedes that the Commission did not specifically consider those reports in conjunction with

[4] WOIC points out that neither Charles Derrick, its Program Manager, or Paris Eley, its Part-time News Director, are employed in positions which would make them privy to WOIC's employment policies; thus there would be no reason to rely on their statements. Moreover, WOIC contends that since the matter was raised by Columbia Citizens in its reply to WOIC's opposition to Columbia Citizens petition to deny, it has not previously had an opportunity to challenge the validity of the affidavits.

its Memorandum Opinion and Order; however, it urges that, viewed in the light of the entire record, those forms do not warrant addition of an issue as to WOIC's employment practices.

4. The petition to enlarge will be denied. The Board is satisfied that the Commission set forth a reasoned analysis for its refusal to include the requested issue in its order designating this matter for hearing. All of the matters relied on by the petitioner, with the exception of the 1971–1972 fair employment reports, were raised by the petitioner and considered by the Commission in the designation Order. Thus, the doctrine set forth in *Atlantic Broadcasting Co., supra*, precludes our addition of the issue. Insofar as petitioner would have us rely on fair employment reports, the Board notes that those documents, viewed in the light of all of the pleadings now before it, do not warrant the inclusion of a fair employment practices issue in this proceeding. The statistics, considered alone or together with petitioner's other allegations, show neither specific instance of discrimination nor a conscious policy of exclusion.

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed March 13, 1973, by Columbia Citizens Concerned with Improved Broadcasting IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.